

**The EU FLEGT Scheme-A critical analysis of its potential for promoting  
effective and equitable forest governance in Africa**

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## List of Acronyms and Abbreviations

AFLEG	African Forest Law Enforcement and Governance
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COFO	FAO Committee on Forestry
COP	Conference of Parties
CPF	Collaborative Partnership on Forests
CSO	Civil Society Organizations
DDS	Due Diligence Systems
EC	European Commission
ECOSOC	UN Economic and Social Commission
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FLEG	Forest Law Enforcement and Governance
FLEGT	Forest Law Enforce, Governance and Trade
FRA	Forest Resource Assessment
FSC	Forest Stewardship Council
GFG	Good Forest Governance
GFRA	Global Forest Resource Assessment
IFC	International Finance Corporation
IFM	Independent Forest Monitoring
ITTA	International Timber Trade Agreement
ITTO	International Timber Trade Organization
JLG	Joint Liaison Group
LAS	Legality Assurance System
LLD	Doctor of Laws
LULUCF	Land Use, Land Use Change and Forestry
MDGs	Millennium Development Goals
NGO	Non-Governmental Organization
NGO	Non-Governmental Organizations
NLBI	Non-Legally Binding Instrument
PEFC	Programme for the Endorsement of Forest Certification
PES	Payment of Ecosystem Services
PROFOR	Program on Forests
REDD+	Reduction of Emissions from Deforestation and Forest Degradation
SADC	Southern African Development Community
SD	Sustainable Development
SDGs	Sustainable Development Goals
SFM	Sustainable Forest Management
TFLET	Tropical Forest Law Enforcement, Governance and Trade
TLAS	Timber Legality Assurance System
UN	United Nations
UNCBD	United Nations Convention on Biodiversity
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCITES	United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNFF	United Nations Forum on Forests

UNFI	UN Forest Instrument
UNITTO	United Nations International Timber Trade Organization
US	United States
VPA/s	Voluntary Partnership Agreement/s
WSSD	World Summit on Sustainable Development

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## **Abstract**

This dissertation critically considers and assesses the potential of the EU FLEGT Scheme to provide an effective and equitable legal regime for curbing illegal logging and promoting sustainable forest management (SFM) and good forest governance (GFG) in African Partner Countries. It considers a broad range of issues starting with the state of Africa's forests and the international regulatory framework for SFM. A critical review of recent studies led to a theoretical framework comprising a set of specific legal issues/themes (substantive issues) central to SFM and GFG. These were accompanied by three broad cross-cutting themes. The substantive issues are: (i) security/clarity on land tenure, ownership and use rights; (ii) stable institutional structures; (iii) clear environmental and forestry standards; (iv) effective and equitable approval processes; (v) participatory, transparent and accountable decision-making; (vi) cooperation and coordination procedures; (vii) monitoring, evaluation and reporting; (viii) effective compliance and enforcement; (ix) financial incentives; (x) equitable sharing of benefits; (xi) conflict resolution procedures; and (xii) mixture of regulatory approaches (direct regulation and voluntary mechanisms). The cross-cutting themes entail: (i) clear coherent and consistent law and policy; (ii) adherence/respect of the rule of law; and (iii) knowledge, capacity and resources. A rigorous assessment of the EU FLEGT Scheme against this theoretical framework shows that the FLEGT Voluntary Partnership Agreements (VPAs) and the EU Timber Regulation (EUTR) form a robust legal regime. The structure of FLEGT VPAs is based on the 16 Principles for FLEGT Partnership Agreements of 2005 and the 18 key elements of FLEGT VPAs. Thus FLEGT VPAs have provided a landmark mechanism for multi-stakeholder participation in the forestry sector, and have propelled inclusivity in decision-making. Thus FLEGT VPAs are founded on international law and international trade laws. On the other hand, the EUTR is composed of a stringent Due Diligence System (DDS) and provision that emphasize legality as a cornerstone for FLEGT. In this context, legality requires the establishment of standards of legality, i.e. timber legality assurance systems and FLEGT licensing. This involves requirements for verification, guidelines for independent monitoring, and market-based legality assurance. Although the FLEGT VPAs and EUTR cover all the 15 legal themes listed above, inconsistencies in national laws and sovereignty on forest resources have either hampered or slowed down effective and efficient implementation of FLEGT VPAs. Nonetheless, remarkable progress has been observed in forest governance across Partner Countries. More research is needed to ascertain the effectiveness of the EUTR and the degree of reduction in illegal logging in Partner Countries. Lastly, there are reports that African timber producing countries have started to increase their exports to other international markets e.g. Australia, USA, China and Japan. Therefore, it is

crucial that the EU collaborate with these international markets and enter into bilateral and multilateral negotiations so as to collectively deal with illegal logging and illegal timber and make a positive impact at a global scale.

## **1.0 Introduction**

This chapter introduces the study. It starts with the overall context of the state of Africa's forests regarding statistics for both legal and illegal logging and discusses the emerging concepts of Sustainable Forest Management (SFM) and good forest governance (GFG). It then discusses the rise of an international and regional regime to promote SFM and GFG. Subsequently the scope, purpose, methodology and structure of the dissertations are articulated. The chapter ends with an interim conclusion.

### **1.1 State of Africa' Forests and SFM and GFG**

In 2010 FAO reported that Africa is the second ranked continent, after South America, with the largest net loss of forests.<sup>1</sup> Between 2000 and 2010 alone, Africa lost about 3.4 million hectares of forests annually. Although the 2015 Global FRA report states that net loss has slowed down due to reduced forest conversion rates and increased forest area expansion.<sup>2</sup> Further, progress towards achieving SFM has improved compared to the 1990's. Thus the net loss of forests has slowed down with slightly more forests under conservation and in protected areas. This is partly attributed to a sharp increase in area of forest with proper forest management plans.<sup>3</sup> Nevertheless, the continued rapid loss of forest area is a great concern for Africa. For example, in Southern Africa the population is estimated at 163.2 million, with a land area of 5,931,020 km<sup>2</sup> and the forest area was 33% of the total land area. The reported annual deforestation rate between 2000 and 2010 was -0.48%.<sup>4</sup> In Eastern Africa, there was an estimated population of 239.0 million, over a land area of 3,454,370 km<sup>2</sup> and the forest area was 18% of total land area. Annual deforestation was -1.04% between 2000 and 2010.<sup>5</sup> In the Sahel region, there was a population of 118.7 million over a total land area of 7,632,950 km<sup>2</sup> of which 14% is forests. Annual deforestation rates between 2000 and 2010 were at -0.29%.<sup>6</sup> On the other hand West Africa had a population of 242 million and a land area of 2,063,100 km<sup>2</sup> of which 22% was covered with forests. Estimated annual rate of deforestation was -1.32% between 2000 and 2010.<sup>7</sup> Central Africa boasts a population of 98.2 million covering a land area of 3,990,270 km<sup>2</sup> of which 61% is covered by forests. Annual

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<sup>1</sup> FAO Global Forest Resources Assessment 2010. FAO Forestry paper 163:xiv. Available: [www.fao.org/forestry/fra](http://www.fao.org/forestry/fra) (Accessed 6 September 2014)

<sup>2</sup> FAO Global Forest Resources Assessment 2015:18-20. FAO Forestry (1990-2015: Twenty five years in review). Available: [www.fao.org/forestry/fra](http://www.fao.org/forestry/fra) (Accessed 11 September 2015)

<sup>3</sup> FAO Global Forest Resource Assessment (above n1)

<sup>4</sup> Forests, Trees and Woodlands in Africa: An Action Plan for World Bank Engagement (2012).

<sup>5</sup> World Bank (above n4)

<sup>6</sup> World Bank (above n4)

<sup>7</sup> World Bank (above n4)

deforestation was estimated at -0.24% between 2000 and 2010.<sup>8</sup> Indiscriminate deforestation and forest land conversion is a threat to African forests. For example, in Cameroon and the Democratic Republic of Congo (DRC) forest destruction for palm plantations is rampant.<sup>9</sup> Furthermore, illegal logging remains a very serious problem in Africa, and the alarming forest loss is partly attributed to illegal forest activities. Despite lack of legitimate statistics, it was reported that illegal logging and trade continue to occur in West Africa and the SADC region at the highest rate.<sup>10</sup> According to a Chatham House Report in the DRC about 90% of timber is sourced through illegal logging.<sup>11</sup> According to WWF<sup>12</sup> approximately 12 million ha will be lost from both Congo and East Africa between 2010 and 2030, respectively. The same report claims that about 50% of timber from Congo\* is logged illegally and transported mainly to China and some to EU markets.<sup>13</sup> Ultimately, Africa has a very daunting task of containing illegal forest activities to reverse and halt forest loss.

### ***Challenges***

In reality, the major threats to African forests are deforestation and illegal logging. Firstly, forest degradation is increased by poverty and unsustainable livelihoods, uncertainties surrounding land tenure and use rights, and fuzzy forest tenure and tree tenure and access and user rights.<sup>14</sup> Secondly, lack of recognition of traditional and cultural considerations such as integration of rural people's grazing and forestry activities discourage local communities from participating in forest management.<sup>15</sup> Thirdly, policy and legislative issues that impact forest governance emanate from inadequate, weak and flawed policies and legislation (i.e. unrealistic policies and legal overreaching legislation) and lack of compliance and poor enforcement.<sup>16</sup> Fourthly, the continued lack of recognition and exclusion of customary law in national policies and legislation has led to

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<sup>8</sup> World Bank (above n4)

<sup>9</sup> Forest Watch FLEGT Update June 2014: 1-8.

<sup>10</sup> FAO (above n1)

<sup>11</sup> For further reading on the alarming illegal logging statistics see Forest Watch (above n9, 2-3)

<sup>12</sup> WWF Living Forests Report: Chapter 5 (4): Saving Forests at risk. WWF Report 2015.

\*"The Congo Basin\* contains 20 per cent of the world's tropical forests 178 – some 301 million ha and makes up one of the most important wilderness areas left on Earth. A mosaic of rivers, forests, savannahs, swamps and flooded forests, the Congo Basin forests span six countries – Cameroon, Central African Republic, Democratic Republic of Congo (DRC), Republic of the Congo, Equatorial Guinea and Gabon – and are home to species such as mountain and lowland gorillas, bonobos, okapis, chimpanzees and elephants". WWF (above n12, 29)

<sup>13</sup> WWF (above n12, 30)

<sup>14</sup> Forest Watch FLEGT Update (above n9)

<sup>15</sup> Ramcilovic-Suominen, S., Gritten, D., Saastamoinen, O. 2010. Concept of livelihoods in the FLEGT voluntary partnership agreement and the expected impacts on the livelihood of forest communities in Ghana. *International Forestry Review*. Vol.12(4):361-369. doi: <http://dx.doi.org/10.1505/for.12.4.361> (Accessed 5 August 2014)

<sup>16</sup> Ramcilovic-Suominen, S., Hansen, C. Why some forest rules are obeyed and others violated: instrumental and normative perspective of forest law compliance in Ghana. *Forest Policy and Economics* (2012c), doi:10.1016/j.forpol.2012.07.002.

degradation of forests in communal lands.<sup>17</sup> Other factors that have exacerbated deforestation and illegal logging include illegality, deep-seated corruption and lack of honesty, transparency and accountability in the private sector and in government.<sup>18</sup> Furthermore, there is lack of political will to support the implementation of national principles, criteria, indicators and standards for SFM. In some States, there is lack of multi-stakeholder forums for public participation in forestry processes.<sup>19</sup> Thus, there is poor knowledge and understanding of policy and legislation. Subsequently, there is lack of stakeholders' capacity to participate in implementation of national forest policies and national forestry programmes.<sup>20</sup> On the other hand, information and data gaps for SFM is riddled with inadequate forest management data and outdated information about the status of the forest resources, especially regarding timber and non-timber forest products and on-going illegal operations.<sup>21</sup>

### ***Emerging concepts: SFM and GFG***

In response to the challenges facing African forestry there are emerging concepts. These are mainly GFG and SFM. The concept of SFM entails the present management and use of forest resources that will not compromise the needs of future use generations. It basically supports the notion of matching resource use with resource availability.<sup>22</sup> The broad definition of SFM is characterized by seven key thematic elements called criteria for SFM which include: (i) extent of forest resources; (ii) forest biological diversity; (iii) forest health and vitality; (iv) productive functions of forest resources; (v) protective functions of forest resources; (vi) socio-economic functions of forests; and (vii) legal, policy and institutional framework (UN, 2008; FRA, 2010). These elements evolve into a set of standard national-level principles, criteria and indicators (C&I) for SFM that form the basis of contemporary national forest policies. The C&I for SFM form a framework for assessing and monitoring SFM and are an integral part of national forestry programmes in most African States. Clearly these C&I are by no means a deterrent of illegal logging, but a mere set of guidelines for best practice. Though, thematic element (vii) guides legality or illegality and is the reference point for Forest Law Enforcement Governance and Trade (FLEGT).

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<sup>17</sup> Ramcilovic-Suominen, S., Matero, J., Shannon, M. 2012. Do Forest Values Influence Compliance with Forestry Legislation? The Case of Farmers in the Fringes of Forest Reserves in Ghana. Small-scale Forestry, 2012b. doi: 10.1007/s11842-012-9209-z (Accessed 3 August 2014)

<sup>18</sup> FAO. Best practice for improving law compliance in forestry 2005. FAO Forestry Paper 145: 7-17.

<sup>19</sup> FERN. Improving forest governance: A comparison of FLEGT VAPs and their impact. FERN. (2013). Available at: <http://www.fern.org> (Accessed 16 August 2014)

<sup>20</sup> FAO (above n18)

<sup>21</sup> FAO (above n18).

<sup>22</sup> Maguire, R. The International Regulation of SFM: doctrinal concepts, governing institutions and implementation 2010 (PhD Thesis) (School of Law, faculty of law, QUT).

Several models of frameworks of good forest governance have been formulated by various individuals and organizations and there is no definite model. The international consensus is that good forest governance should adhere to three interdependent pillars otherwise known as core components of forest governance, and five cross-cutting principles perceived as generally accepted principles of good forest governance.<sup>23</sup> The pillars include: policy, legal, institutional and regulatory frameworks, planning and decision-making processes and implementation, enforcement and compliance. Whilst the five principles comprise: accountability, effectiveness, efficiency, fairness/equity, participation and transparency.<sup>24</sup> The FAO and PROFOR framework for the assessment of forest governance of 2011 brings a more comprehensive matrix for evaluating the extent of forest governance in any state. This framework comprises the three fundamental pillars, and thirteen basic components with associated subcomponents for assessing and monitoring forest governance.<sup>25</sup> These subcomponents include: forest-related policies and laws, legal framework to support and protect land tenure, ownership and use rights, concordance of broader development policies with forest policies, institutional frameworks, and financial incentives, economic instruments and benefit sharing, stakeholder participation, transparency and accountability, stakeholder capacity and action, administration of forest resources, forest law enforcement, administration of land tenure and property rights, cooperation and coordination and measures to address corruption.<sup>26</sup> In essence, GFG is a precondition for SFM. The framework for GFG lays the foundation for FLEGT. The pillars, principles and basic sub-components and associated components are pre-requisite for FLEGT.

Implementation of SFM and GFG frameworks under national forest policies and as part of national forestry programmes has commenced in most countries. Preliminary results show a shift towards increased afforestation and reforestation and reduced deforestation and improved FLEGT.

## **1.2 Rise of an International and Regional Regime to promote SFM and GFG**

Several international mechanisms for guiding SFM and GFG are in place. These international processes include international agreements and conventions, international forestry principles, and the development and implementation of criteria and indicators (C&I) for SFM. In addition, there is the World Bank Forestry Strategy, and FAO initiatives. Moreover, voluntary programmes that set

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<sup>23</sup> Maguire. (above n22)

<sup>24</sup> Mushonga. Framing Good Forest Governance: A Zimbabwean perspective 2012 ( MSc Thesis. Wageningen University).

<sup>25</sup> FAO PROFOR 2011 Framework for assessing and monitoring forest governance. Available at: <http://www.fao.org/forestry> (Accessed 21 December 2014)

<sup>26</sup> FAO (above n25)



principles, criteria, indicators and standards for SFM have been established. However, in the absence of a legally-binding instrument on forests, the international regulation of SFM is guided by regional and international FLEG/T initiatives. Of particular importance for this study is the EU FLEGT Scheme. A detailed outline of international processes is highlighted in the next section.

### ***Relevant International Conventions***

In terms of international responses, the oldest is the 1973 the United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (UNCITES) which was established to regulate the international trade in flora and fauna.<sup>27</sup> This convention supports SFM and GFG through reconciling economic and ecological sustainability. Article II of the fundamental principles of CITES fight against extinction of traded species, which strongly echoes the principles of SFM. Furthermore, to support sustainable forest management and good forest governance there was the landmark Rio Convention of 1992 on the environment and development that culminated in the UNCED Agenda 21 International Forestry Principles (i.e. where an agreement was reached on numerous forest issues by the negotiators to ensure that forests are conserved and sustainably managed).<sup>28</sup> Subsequently there was an emergence of the Rio Conventions, i.e. the UN Convention on Biological Diversity (UNCBD) (1992),<sup>29</sup> UN Convention to Combat Desertification (UNCCD) (1994)<sup>30</sup> and the UN Framework Convention on Climate Change (UNFCCC) (1992).<sup>31</sup> All the Rio Conventions address SFM and forest governance issues, and as such these international obligations influence and guide the development and implementation of coherent and synergized regional and national policies and laws surrounding SFM and FLEGT.<sup>32</sup> Subsequent processes include: United Nations General Assembly Resolution on the Non-Legally Binding Instrument (NLBI) on all types of forests of 2007<sup>33</sup> through the United Nations Forum on Forests (UNFF) that was established by

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<sup>27</sup> Wijnstekers 2011: The Evolution of CITES - 9th edition. International Council for Game and Wildlife Conservation. Available: [www.cic-wildlife.org](http://www.cic-wildlife.org) (Accessed 6 March 2015)

<sup>28</sup> UNCED 1992a. Agenda 21. Agenda 21, International Forestry Principles.

<sup>29</sup> UNEP, 1992b. United Nations Convention on Biodiversity (UNCBD). Available at <http://www.unep.org/documents> (Accessed 6 August 2014)

<sup>30</sup> UNEP, 1995a. United Nations Convention to Combat Desertification (UNCCD). Available at <http://www.unep.org/documents> (Accessed 29 July 2014)

<sup>31</sup> UNEP, 1992c. United Nations Framework Convention on Climate Change (UNFCCC). 1992. Available at <http://www.unep.org/documents> (29 July 2014)

<sup>32</sup> The Rio Conventions: Action on Forests. 2012: Available at: [unfccc.int/resource/docs/publications/rio\\_20\\_forests\\_brochure.pdf](http://unfccc.int/resource/docs/publications/rio_20_forests_brochure.pdf) (Accessed 7 August 2014)

<sup>33</sup> Non-legally Binding Instrument on Sustainable Forest Management of all Types of Forests, GA/Res/62/98 of 17 December 2007, available at [http://www.un.org/esa/forests/pdf/session\\_documents/unff7/UNFF7\\_NLBI\\_draft.pdf](http://www.un.org/esa/forests/pdf/session_documents/unff7/UNFF7_NLBI_draft.pdf), last (Accessed 28 February 2015).

the UN Economic and Social Commission (ECOSOC) in 2000,<sup>34</sup> UNCBD Resolutions, decisions and action plan on Programme of Forest Biodiversity, UNFCCC Resolutions and Decisions on Reducing Emissions from Deforestation and Forest Degradation (REDD+) and other forest related adaptation and mitigation strategies and measures aimed at ensuring productive landscapes and resilient ecosystems, and UNCCD Resolutions, Decisions and Plan of Action related to forestry including sustainable land and forest management.<sup>35</sup>

### ***International Forest Principles and Criteria and Indicators for SFM***

In the past forest management was directed to sustainable production of wood and timber.<sup>36</sup> Later the focus shifted to the concept of sustainable management of forests for economic, social and environmental dimensions.<sup>37</sup> The new paradigm is defined by two sets of forestry principles i.e. the UNCED Agenda 21 International Forestry Principles and Non-Legally Binding Instrument (NLBI) on all types of forests of 2007 (now called the UN Forest Instrument (UNFI)).<sup>38</sup> These lay a foundation for the international legal regime for SFM. This is in line with the proposal of action of the Intergovernmental Panel on Forests (IPF) and the Intergovernmental Forum on Forests (IFF). The mechanism for guiding action and monitoring progress or lack of it in SFM is specifically referred to as Criteria and Indications (C&I). Prior to UNCED 1992, this C&I concept was spearheaded by the International Timber Trade Organization (ITTO) for its members to ensure sustainable management of tropical forests. Thereafter, C&I for SFM have been adopted at global, regional, national and farm management unit level. This concept is widely recognized by IPF, IFF, the United Nations Forum on Forests (UNFF), the International Tropical Timber Council (ITTC), the FAO Committee on Forests (COFO), the Conference of parties of the United Nations Convention on Biological Diversity (CBD), and now the World Trade Organization (WTO) Committee on Trade and the Environment. On one hand, international trade in timber is regulated through WTO and regional trade agreements. On the other hand there is no international regulation of SFM because there is no internationally legally-binding instrument on forests. Consequently, there is no international regulation of SFM. However, there are international guidelines to SFM

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<sup>34</sup> UNFF is a subsidiary body of ECOSOC which was established by ECOSOC Res. 2000/35 with the main objective to promote the management, conservation and sustainable development of all types of forests; ECOSOC Res. 2000/35 of 17 December 2007 available at [http://daccessods.un.org/access.nsf/Get?OpenAgent&DS=E/2000/99\(SUPP\)&Lang=E.](http://daccessods.un.org/access.nsf/Get?OpenAgent&DS=E/2000/99(SUPP)&Lang=E.), (Accessed 28 April 2015).

<sup>35</sup> The Rio Conventions (above n32, 7-8)

<sup>36</sup> F. Castañeda. Criteria and indicators for sustainable forest management: international processes, current status and the way ahead. *Unasylva* 203, Vol. 51, 2000

<sup>37</sup> Castañeda. (above n36)

<sup>38</sup> Castañeda. (above n36)

which provide “soft law”. These include the Forest Principles, and action programmes of the IPF, IFF and the UNFF and regional and political commitments for SFM. The C&I processes form a major part of international, regional and national level mechanisms for guiding actions for SFM.

### ***World Bank and FAO Initiatives***

The World Bank released its revised Forest Policy and Strategy in 2002 which supports SFM and FLEG.<sup>39</sup> On one hand FAO produces “The State of the World’s Forest Report” which provides a global outlook on the forest sector in accordance with sustainable development and its environmental, economic and social pillars.<sup>40</sup> This “The State of the World’s Forest Report” further applies the seven thematic elements of SFM that have been internationally agreed as a framework for SFM. On the other hand, the FAO Global Forest Resource Assessment (FRA) adapted the seven thematic elements of SFM as a reporting framework in line with global processes and the need to address forest resources, management and uses from a holistic perspective.<sup>41</sup> Thus the FRA is centred on: (i) the extent of forest resources; (ii) forest biological diversity; (iii) forest health and vitality; (iv) productive functions of forest resources; (v), protective functions of forest resources; (vi) socio-economic functions of forests and ; and (vii) legal, policy and institutional framework. Recently there has been the development and implementation of the FRA Long-term Strategy (2012-2030) which aims to support SFM through global forest resources assessment<sup>42</sup> (FRA Long-term Strategy 2012-2030).

### ***Regional FLEG/T initiatives***

Despite the plethora of soft laws for guiding SFM there has been an alarming rate of forest loss, mainly due to indiscriminate deforestation and illegal logging. This has manifested in negative social, cultural, ecological, environmental, financial and economic consequences. Consequently,

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<sup>39</sup> The World Bank, Forest Policy and Strategy 2002. Available online: <http://www.worldbank.org>. (Accessed 9 July 2014)

<sup>40</sup> FAO. State of the World’s Forests 2007. Food and Agriculture Organization of the United Nations (FAO), Rome. Available at: <http://www.fao.org/docrep/009/a0773e/a0773e00.htm> (Accessed 8 December 2014)

<sup>41</sup> Husgafvel. R. Global and EU governance for sustainable forest management with special reference to capacity building in Ethiopia and Southern Sudan 2010 (Academic dissertation) (Faculty of Agriculture and Forestry of the University of Helsinki).

<sup>42</sup> FAO. Supporting Sustainable Forest Management through Global Forest Resources Assessment: Long-Term Strategy 2012-2030. COFO/2012/7.3. Available: <http://www.fao.org/forestry/fra/en/> (Accessed 8 January 2015)

this has triggered a new international forest regime called FLEGT.<sup>43</sup> Both timber producing countries and timber importing countries are hit by the impacts of illegal logging.<sup>44</sup> Timelines of major actions to fight illegal logging started in 1992 with the Forest Principles and Chapter 11 of UNCED Agenda after the 1992 Rio Conference in Brazil.<sup>45</sup> Subsequently, there was the G8 Action Programme on Forests against illegal logging in 1998.<sup>46</sup> In 2001 emerged the East Asia Bali Declaration.<sup>47</sup> During that same time the G8 FLEG Declaration was announced.<sup>48</sup> Building on this declaration, the EU FLEGT Action Plan was launched in 2003 following the WSSD in 2002 where FLEGT issues surfaced enormously.<sup>49</sup> Africa was also involved in the FLEGT process through various Regional Economic Commissions, and consequently the inaugural AFLEG Ministerial Conference was held in Yaoundé, Cameroon in 2003.<sup>50</sup> Immediately after, in 2004 there was the Europe and North Asia St Petersburg Declaration on FLEG.<sup>51</sup> The Green Purchasing Law of 2006 was unveiled in Japan.<sup>52</sup> In 2008 the US Lacey Amendment Act was effected.<sup>53</sup> Furthermore, the Australia Illegal Logging Prohibition Act of 2012 came into force.<sup>54</sup> Ultimately, the EU Timber Regulation (EUTR) was adopted in 2010, and came into force in 2013.<sup>55</sup> Recently, the SADC Regional FLEGT Programme was approved in 2014.<sup>56</sup>

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<sup>43</sup> EU FLEGT Facility (2015). What is EU FLEGT? [URL:http://www.euflegt.efi.int/flegt-action-plan](http://www.euflegt.efi.int/flegt-action-plan) (Accessed 9 May 2015).

<sup>44</sup> McCoy.K. Reducing the role of the United Kingdom in the illegal timber trade: A critical analysis of the proposed „Illegally Logged Timber (Prohibition of Sale and Distribution)“ Bill.2008 (Master of Science and the Diploma of Imperial College London)

<sup>45</sup> UNCED 1992a. Agenda 21 (above n28, Chapter 11)

<sup>46</sup> “G8 Action Programme on Forests – Backgrounders”– Accompanying Document to the “G8 Action Programme on Forests – Final Report”.

<sup>47</sup> Forest Law Enforcement and Governance East Asia Ministerial Conference Bali, Indonesia 11 – 13 September 2001 Ministerial Declaration. (Accessed 6 January 2015)

<sup>48</sup> The G8 Forest Law Enforcement and Governance (FLEG) Declaration.

<sup>49</sup> Maguire, R. (above n22)

<sup>50</sup> AFLEG Min. Decl. 16-10-03(c). Africa Forest Law Enforcement and Governance (AFLEG) Ministerial Conference 13-16 October, 2003. Ministerial Declaration, Yaoundé, Cameroon October 16, 2003.

<sup>51</sup> The St. Petersburg Declaration on Forest Law Enforcement and Governance (FLEG) in Europe and North Asia (ENA), Ministerial Conference on Forest Law Enforcement and Governance that took place in St. Petersburg, Russia, from November 22nd-25th, 2005.

<sup>52</sup> Giurca, J., Pepke, M., Prestermon. P., and Winkel. G. 2015. Assessment of EU Timber Regulation and FLEGT Action Plan. From Science to Policy 1, European Forest Institute, 2015. Available: [http://www.efi.int/files/attachments/publications/efi\\_fstp\\_1\\_2015.pdf](http://www.efi.int/files/attachments/publications/efi_fstp_1_2015.pdf) (Accessed 12th June 2015).

<sup>53</sup> Lacey Amendment Act of 2008.

<sup>54</sup> Australia Illegal Logging Prohibition Act of 2012.

<sup>55</sup> EU Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010, Laying down the Obligations of Operators Who Place Timber and Timber Products on the Market. URL: [http://ec.europa.eu/environment/forests/timber\\_regulation.htm#rules](http://ec.europa.eu/environment/forests/timber_regulation.htm#rules) (Accessed 9 July 2014).

<sup>56</sup> SADC Regional Forest Law Enforcement, Governance and Trade (FLEGT) Programme Document Final Draft, February 2013 Gaborone.

### ***The EU FLEGT Scheme in brief***

Then contemporary EU FLEGT Scheme emerged. The EU FLEGT Action Plan was adopted in 2003. This action plan provides measures to exclude illegal timber from EU markets, and to increase supply of legitimate timber and increase demand for legal timber and timber products.<sup>57</sup> Resulting from the FLEGT Action Plan was a FLEGT regulation in 2005 (to negotiate Voluntary Partnership Agreements),<sup>58</sup> and an implementation regulation in 2008<sup>59</sup> which culminated in the EUTR in 2010.<sup>60</sup> In 2012 two pieces of secondary legislation to complement and support the EUTR followed i.e. Commission Delegated Regulation (EU) No 363/2012 of 23 February 2012<sup>61</sup> and the Commission Implementing Regulation (EU) No. 607/2012 of July 2012.<sup>62</sup>

### ***International Voluntary programmes***

In addition to these international and regional processes and instruments, there exist international voluntary programmes. The main ones are the Forest Stewardship Council (FSC) and the FSC principles and criteria for Forest Stewardship<sup>63</sup> and the Programme for the Endorsement of Forest Certification (PEFC) and the PEFC International Standard: Requirements for certification schemes.<sup>64</sup>

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<sup>57</sup> EU. Forest Law Enforcement, Governance and Trade (FLEGT) Proposal for an EU Action Plan. Communication from the Commission to the Council and the European Parliament. Brussels, 21.5.2003 Com (2003) 251 Final

<sup>58</sup> EU. Council FLEGT Regulation 2005 (Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community).

<sup>59</sup> EU. Commission FLEGT Regulation 2008 (Commission Regulation (EC) No 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community).

<sup>60</sup> EU (2010) Regulation (EU) No. 995/2010. (above n52)

<sup>61</sup> EU. Commission Delegated Regulation (EU) No 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organizations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market.

<sup>62</sup> EU. Commission Implementing Regulation (EU) No. 607/2012 of July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organizations as provided for in the Regulation (EU) No. 995/2010 of the European parliament laying down the obligations of operators who place timber and timber products on the market

<sup>63</sup> FSC. Forest Stewardship Council: Principles and Criteria for Forest Stewardship 2012. Available at <http://www.fsc.org> (Accessed 16 July 2014)

<sup>64</sup> PEFC. International Standard: Requirements for certification schemes 2010. Available at <http://www.pefc.org> (Accessed 16 July 2014)

### 1.3 Scope, Purpose, Methodology and Structure

The objective of this research is to critically assess the potential of the EU FLEGT Scheme to provide an effective and equitable legal regime for FLEGT, GFG and SFM in Africa. In order to achieve this objective it will be necessary to consider a broad range of issues.

Firstly, it is necessary to understand the broader international and regional forestry regime and associated processes and institutions. Secondly, a good understanding of the multilateral environmental agreements on trade in forest products is imperative. Thirdly, a re-look at the Rio Conventions and their subsequent processes and programmes of action on forests is important. It is also important to review international forestry principles and their potential role in forming the basis for a common legal position in a multilateral convention. This is followed by an overview of the nine eco-regional processes on C&I for SFM. These entail C&I at the global, regional, national and forest management unit levels and cover 149 countries. This is crucial in understanding the origins of the seven thematic areas that guide and monitor SFM and further guide trade in forest products. Understanding the subsequent SFM tools developed by the FAO and the World Bank is also important. Lastly, the insight into international voluntary programmes for forest certification with the associated principles, criteria, indicators and standards for SFM is key. This will be considered in Chapter 2.

One cannot consider the effectiveness of the EU FLEGT Scheme in isolation. Fortunately several commentators have started to develop guidelines for informing the development of an effective and equitable international and regional governance framework in the forestry context. These importantly include: A recent PhD research study titled “Forest Law compliance in High-Forest Zone of Ghana: an analysis of forest farmers” livelihoods, their forest values, and the factors affecting law compliance behaviour”,<sup>65</sup> A PhD study titled “The International Regulation of Sustainable Forest Management: doctrinal concepts, governing institutions and implementation”,<sup>66</sup> A PhD study titled “Global and EU governance for sustainable forest management with special reference to capacity building in Ethiopia and Southern Sudan”,<sup>67</sup> A PhD research on non-timber

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<sup>65</sup> Ramcilovic-Suominen, S. Forest Law compliance in High-Forest Zone of Ghana: an analysis of forest farmers’ livelihoods, their forest values, and the factors affecting law compliance behaviour. 2012. (PhD Dissertation) (School of Forest Science, University of Eastern Finland).

<sup>66</sup> Maguire. (above n22)

<sup>67</sup> Husgafvel. (above n41).

forest products policy,<sup>68</sup> a Masters research titled “Framing good governance: a Zimbabwean perspective”,<sup>69</sup> a BSc dissertation titled “An assessment of good governance in community forestry user groups: A Case Study in CFUGs of Dhading district”,<sup>70</sup> a 2012 law publication about an analytical framework for forest law compliance,<sup>71</sup> a 2012 law publication on forest values and forest law compliance,<sup>72</sup> a 2012 law publication on livelihoods and FLEGT VPAs,<sup>73</sup> a 2012 law publication on instrumental and normative perspective of forest law compliance,<sup>74</sup> the 2009 World Bank analytical framework for governance reforms,<sup>75</sup> the 2013 World Resources Institute’s Governance of Forests Initiative Indicator Framework,<sup>76</sup> the 2011 FAO and PROFOR comprehensive framework for assessing and monitoring forest governance,<sup>77</sup> the 2014 PROFOR and FAO practical guide for assessing forest governance,<sup>78</sup> and the technical report on the 2007 World Bank Forestry Strategy: a review of implementation<sup>79</sup> and others. If one scrutinizes these documents, there appear to be a range of common themes or elements which underpin the development and implementation of an equitable and effective legal regime for FLEGT, GFG and SFM. These themes or elements include a set of twelve specific substantive legal issues as follows: Security and clarity on land tenure, access, ownership and use rights; Stability of institutional structures; Clear social, environmental and forestry standards; Effective and equitable approval processes; Transparency, accountability, and public participation; Cooperation and coordination procedures; Monitoring and evaluation (M&E) and reporting; Effective compliance and enforcement; Financial incentives and economic instruments for sustainable use; Equitable sharing of forest benefits amongst stakeholders; Equitable conflict resolution procedures; and a Mixture of regulatory approaches (direct regulation and voluntary mechanisms). In addition, these themes are

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<sup>68</sup> Dlamini. 2007. Towards improvement in policy and strategy development for the sustainable of non-timber forest products: a case study of Swaziland. 2007 (Ph.D. Dissertation) (University of Stellenbosch. Cape Town. RSA).

<sup>69</sup> Mushonga 2012. (above n24).

<sup>70</sup> Upadhyay. An Assessment of Good Governance In Community Forestry User Groups: A Case Study in CFUGs of Dhading district. BSc Forestry Thesis, 2006. Tribhuvan University, Institute of Forestry, Hetauda Campus, Hetauda Nepal.

<sup>71</sup> Ramcilovic-Suominen, S., Epstein, G. Towards an analytical framework for forest law compliance. *International Forestry Review* Vol.14(3):326-336. doi: <http://dx.doi.org/10.1505/146554812802646611> (Accessed 2 August 2014)

<sup>72</sup> Ramcilovic-Suominen, S., Matero, J., Shannon, M. 2012. (above n17)

<sup>73</sup> Ramcilovic-Suominen, S., Gritten, D., Saastamoinen, O. 2010. (above n15)

<sup>74</sup> Ramcilovic-Suominen, S., Hansen, C. (above n16)

<sup>75</sup> World Bank. *Roots for Good Forest Outcomes: An Analytical Framework for Governance Reforms* 2009. Report No. 49572-GLB.

<sup>76</sup> World Resource Institute. *Assessing Forest Governance: The Governance of Forests Initiative Indicator Framework* 2013. Available: [www.wri.org](http://www.wri.org) (Accessed 7 January 2015)

<sup>77</sup> FAO PROFOR 2011(above n25)

<sup>78</sup> FAO PROFOR 2014. *Assessing Forest Governance: A Practical Guide to Data Collection, Analysis, and Use*. Available: [www.fao.org/forestry/eu-flegt/](http://www.fao.org/forestry/eu-flegt/) (Accessed 21 December 2014)

<sup>79</sup> World Bank. *The World Bank Forestry Strategy: Review of implementation* 2007. Available: [www.worldbank.org/rural](http://www.worldbank.org/rural) (24 November 2014)

accompanied by three broad cross-cutting themes, and these are: clear, coherent and consistent law and policy, adherence/respect of the rule of law, and knowledge, capacity and resources. Chapter 3 seeks to distil and explain these themes and their relevance to FLEGT, GFG and SFM. Having distilled and explained these themes, the dissertation turns to focus specifically on the EU FLEGT Scheme. Using the elements distilled in Chapter 3, Chapter 4 comprises an in-depth critical evaluation of the EU FLEGT Scheme in the context of the theoretical framework derived from these elements. It is divided into two main parts. The first part provides a brief overview of how the scheme fits together into a logical hierarchy. The second part seeks to evaluate it against the elements distilled in Chapter 3. Subsequently, Chapter 5 provides conclusions on the evaluation of the FLEGT Scheme. Consequently, recommendations are made for ease of strengthening the scheme in order to make it equitable and effective legal regime for FLEGT, GFG and SFM.



## **2.0 Understanding the international regulatory context for SFM**

This chapter provides the overall context of the international regulatory context for GFG and SFM. It starts by giving a brief overview of the international forestry regime, trade agreements, the Rio conventions, and forestry principles. Subsequently, the FAO tools for forest assessment and the World Bank Forestry Strategy are discussed. Further, timelines for various regional and international C&I for SFM and trade in forest products are highlighted. Finally the leading international voluntary programmes for forest certification are described. The chapter closes with an interim conclusion.

### **2.1 International Forestry Regime**

In the absence of an international forest convention, there is a variety of hard laws and soft laws and forestry principles that seek to support GFG and support SFM. These include multilateral and bilateral environment agreements that inform the development of an international forestry regime. Furthermore, there are international voluntary programmes that have spearheaded SFM since the 1992 Rio Earth Summit on Environment and Development. On one hand, the implementation of international instruments and proposals of action for SFM are guided by internationally recognized institutions such as the FAO, COFO, IPF, IFF, ITTO, ITTC, WTO Committee on Trade and the Environment, the World Bank and the Conference of parties of UNCBD, UNCCD and UNFCCC . On the other hand, voluntary mechanisms or private labels are managed by various Certification Organizations. Other key international forestry institutions include the UN Forest Forum (UNFF) which was solely established to regulate all forest values, including productive forest values, protective forest values, and social, cultural, economic, financial, ecological and environmental forest values. However, the UNFF has so far not managed to formulate specific international forestry obligations but has only documents that recognize competing values and interests in forest areas.<sup>80</sup> Another recognized network is the Collaborative Partnership on Forests (CPF) which consists of 14 intergovernmental institutions that focus their work on forest-related issues. The CPF encourages dialogues and interchange about forest research and contemporary policy developments and sharing lessons learnt.<sup>81</sup> The CPF has so far developed the International Forestry Directory,<sup>82</sup>

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<sup>80</sup> Maguire. (above n22).

<sup>81</sup> Collaborative Partnership on Forests-Towards a Common Information Framework for Forest-Related Reporting to International Processes (2003)

<sup>82</sup> Collaborative Partnership on Forests, International Forestry Directory (2007).  
Available: [www.fao.org/forestry/site/1662/en](http://www.fao.org/forestry/site/1662/en) (Accessed 16 March 2015)

Sourcebook on Funding for SFM<sup>83</sup> and Streamlining Reporting.<sup>84</sup> Below is an overview of the key existing international regulatory mechanisms relevant to SFM and GFG. On the other hand, leading voluntary mechanisms include the highly regarded FSC and PEFC.

## **2.2 Multilateral environment agreements on trade**

The principal international schemes include the ITTO guidelines for SFM, CITES, the UNCED Agenda 21 International Forestry Principles, and the Rio Conventions as described below. These entail essential elements of GFG, SFM and support FLEGT.

### ***2.2.1 International Tropical Timber Organization (ITTO) Guidelines for the Sustainable Management of Natural Tropical Forests***

The International Tropical Timber Agreements (ITTA) of 1983 and 1994 comprises parties from timber producing countries and those from timber consuming countries alike. ITTA further established the International Tropical Timber Organization (ITTO) with the mandate to promote trade in timber from sustainably managed sources. In addition ITTA provides an effective framework for coordination, research and development, and supports industrial reforestation and sound forest management. Consequently, ITTO has developed Criteria and Indicators for SFM to support and guide Parties in implementing ecologically, socially and economically viable forest management practices.<sup>85</sup> The ITTO C&I for SFM are tailored for tropical forests. Ultimately, the C&I cover enabling conditions for SFM, forest resources security, forest ecosystem and health condition, flow of forest produce, biological diversity, soil and water, and economic, social and cultural aspects.<sup>86</sup> These factors are interrelated and interdependent and all contribute to SFM.

### ***2.2.2 The Convention on International Trade in Endangered Species of Fauna and Flora (CITES) of 1973***

The ultimate purpose and aim of CITES is to regulate international trade in species of wild fauna and flora to make sure that ecological sustainability and economic sustainability are reconciled.<sup>87</sup> In other words international trade in wild fauna and flora does not threaten their survival in the planet.

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<sup>83</sup> Collaborative Partnership on Forests, Sourcebook on Funding for SFM (2007). Available: [www.fao.org/forestry/site/1662/en](http://www.fao.org/forestry/site/1662/en) (Accessed 16 March 2015)

<sup>84</sup> Collaborative Partnership on Forests, Streamlining Reporting (2006). Available: [www.fao.org/forestry/site/1662/en](http://www.fao.org/forestry/site/1662/en) (Accessed 16 March 2015)

<sup>85</sup> Castañeda. (above n36)

<sup>86</sup> Castañeda. (above n36)

<sup>87</sup> Article II (1-4) of CITES. UNEP, 1975. United Nations Convention on International Trade in Species of Endangered Flora and Fauna (CITES). 1975. Available at <http://www.unep.org/Documents> (Accessed 13 August 2014)

Similarly, CITES plays a pivotal role of monitoring and regulating trade in listed endangered tree species. Notably, all the European Commission Member States are Parties to CITES. As a result CITES is implemented in the European Community and this is through Council Regulation (EC) No 338/97 of 9 December 1996 and Commission Regulation (EC) No 1808/2001 of 30 August 2001. Of paramount importance to FLEGT is the fact that CITES ensured that fully-fledged mechanisms are in place to make sure that all trade in listed tree species is both legal and sustainable.<sup>88</sup> In addition, at present there are 19 tree species listed in Appendices I and II of CITES. This implies that timber and non-timber products derived from these tree species can only be exported to the EU or imported into the EU if and only if they are accompanied by a recognized and valid export permit from the timber producing country, which is known as the country of origin, and a corresponding valid EU import permit. The import permit is valid only if the timber meets the legality requirements of the country of origin. The EU import permit can only be issued upon satisfactory evidence that granting such would not compromise the long-term distribution and survival of the species *en situ*.<sup>89</sup> Over and above that, one genus and three tree species are listed in Appendix III of CITES where timber producing countries and other countries have unilaterally restricted exports of such tree species. Likewise, export permits are only issued for such tree species on condition that harvesting met the legal requirements of the source country. Ultimately, recent research studies have identified CITES as the most effective and efficient and successful international instruments in the environment sector at local, national, regional and international levels. Thus CITES is perceived not only as an ordinary conservation treaty but as a robust trade instrument responsible for the reconciliation of legality and sustainability as well as ecological sustainability and economic sustainability.<sup>90</sup>

### **2.3 Multilateral environment agreements: Rio conventions**

The Rio Conventions, i.e. the United Nations Framework Convention on Climate Change (UNFCCC), the United Nations Convention on Biological Diversity (CBD) and the United Nations Convention to Combat Desertification (UNCCD), all recognize the significant role of forests to the accomplishment of their respective goals and objectives.<sup>91</sup> These conventions are working as a collective to augment collaborations in this area. Consequently, the Joint Liaison Group (JLG) of the secretariats of the CBD, the UNCCD and the UNFCCC was established to foster coordination

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<sup>88</sup> Wijnstekers. (above n27)

<sup>89</sup> Wijnstekers. (above n27)

<sup>90</sup> Saunders. J. and Reeve. R.: The EU Timber Regulation and CITES. Energy, Environment and Resources PP EER 2014/08. Available: [www.chathamhouse.org](http://www.chathamhouse.org) (Accessed 9 February 2015)

<sup>91</sup> The Rio Conventions (above n32, 3)

between the three conventions regarding information sharing and exchange.<sup>92</sup> Furthermore, all three secretariats are members of the CPF, which seeks to promote the sustainable forest management. These conventions influence and guide the development and implementation of coherent and synergized regional and national policies and laws surrounding sustainable forest management and FLEGT.<sup>93</sup>

### **2.3.1 The United Nations Convention on Biological Diversity (CBD) of 1992**

The Convention on Biological Diversity (CBD) sets out relevant guidelines, mechanisms and interventions that need to be developed and implemented in order to promote SFM and eliminate illicit harvesting of timber and associated trade.<sup>94</sup> To the benefit of FLEGT all EU Member States, as well as the European Union itself, are signatories to the CBD and are legally bound by its Decisions. On that note, the parties to the Convention are obliged to adhere to behaviour and conduct that seek to promote compliance and forest law enforcement,<sup>95</sup> Parties to the Convention are duty-bound to support policy and legislative reforms regarding FLEGT, which include: the establishment of a sound and robust definition of illegal activities, the establishment and operationalization of effective deterrents and sanctions, spearheading capacity building across all spheres of society and of all stakeholders so as to enhance capacities for effective law enforcement. The CBD addresses issues on forests through several means, including programmes of work on forests, protected areas, islands, mountains, drylands, and inland water. The programme of work on forest biodiversity comprises 130 definite actions to safeguard the conservation and sustainable use of forest biodiversity at the local and national levels, including for instance developing forest law enforcement, governance and trade schemes (FLEGT schemes).<sup>96</sup> Under the CBD, all Parties are mandated to develop and occasionally review and update National Biodiversity Strategies and Action Plans (NBSAPs) as the guiding and overarching policy framework for national implementation, in Key decisions: X/2, X/33, X/35, IX/5, VI/22.<sup>97</sup> The CBD directly addresses sustainable use of forests and the associated biodiversity through a comprehensive programme of work, Decision IV/22 and IX/5 adopted in 2002 and revised in 2008. This Convention guides the development of national forest and biodiversity laws.

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<sup>92</sup> The Rio Conventions (above n32, 3)

<sup>93</sup> The Rio Conventions (above n32, 3)

<sup>94</sup> For more details see: Secretariat of the Convention on Biological Diversity (2004). Expanded programme of work on forest biological diversity. Montreal, 22p. (CBD programmes of work). Available at: <http://www.biodiv.org> (Accessed 17 November 2014)

<sup>95</sup> CBD programme of work (above n90, Goal 4 Objective 1 Activities a-h)

<sup>96</sup> CBD programmes of work (above n90, Goal 4 Objective 1 Activity h)

<sup>97</sup> The Rio Conventions (above n32, 5-6)

### **2.3.2 The United Nations Convention to Combat Desertification (UNCCD) of 1994**

The objective of this Convention is to fight desertification and alleviate the impacts of drought in countries facing severe drought and/or desertification, predominantly in Africa, through collective action, complemented by international cooperation and partnerships, within the context of an integrated approach which is consistent with Agenda 21 of the Rio Declaration of 1992, with the ultimate aim of contributing to the realization of sustainable development in affected areas.<sup>98</sup> This treaty seeks to promote integrated and sustainable management of natural resources including agricultural land and pastoral land, vegetation cover and wildlife, forests, water resources and biological diversity.<sup>99</sup> In addition, this Convention considers all types of forests as an essential element in the obliteration of poverty in the drylands, and as the first step towards healing the drylands and shielding them from desertification and drought as guided by Key decisions: 8/COP.4, 2/COP.6, 12/COP.7, 3/COP.8, 4/COP.8.<sup>100</sup> The 10 year strategic plan of the UNCCD (2008 to 2018) outlines four strategic objectives and five operational objectives that are relevant to sustainable development, sustainable forest management and sustainable livelihoods.<sup>101</sup> National action programmes (NAPs) are currently being aligned in order to be compatible with the UNCCD 10 year strategic plan (2008-2018), and the emphasis is on combating desertification, land degradation and the effects of drought (DLDD).<sup>102</sup> Rio+20 and beyond, it is reported that the convention will continue to advocate for sustainable land management (SLM) and advance monitoring and verification of the status of land degradation and concurrently monitor and assess the status of dryland forests.<sup>103</sup>

### **2.3.3 The United Nations Framework Convention Climate Change (UNFCCC) of 1992**

The UNFCCC seeks to stabilize greenhouse gas concentration in the atmosphere. This would prevent anthropogenic interference with the climate system and enable natural adaptation of ecosystems to climate change. In addition, the UNFCCC recognizes the significant contribution of forests to climate change mitigation, as they represent a substantial global carbon stock as supported by its three interdependent pillars: (1) Reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+) (Key decisions: Decisions 1/CP.13, 2/CP.13, 4/CP.15, 1/CP.16, 2/CP.17); (2) Land use, land use change and forestry (LULUCF) in developed

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<sup>98</sup> Article 2 Objective 1 of UNCCD.

<sup>99</sup> Article 2 Objective 2 of UNCCD.

<sup>100</sup> The Rio Conventions (above n32, 6-7)

<sup>101</sup> The 10 year strategic plan of the UNCCD (2008 to 2018).

<sup>102</sup> UNCCD (above n98)

<sup>103</sup> The Rio Conventions (above n32, 7)

countries (Key decisions: Decisions 16/CMP.1, 2/CMP.6, 2/CMP.7); and (3) Afforestation and reforestation project activities under the clean development mechanism (Key decisions: Decisions: 5/CMP.1, 6/CMP.1).<sup>104</sup>

Based on the above, Parties to all the three Rio Conventions have taken decisions to promote, support, encourage the sustainable management of forests and the maintenance and enhancement of the economic, social and environmental values of all types of forests. This has built synergy and cohesion amongst the various programmes of the Conventions, which has ultimately enhanced their potential for efficacy, efficiency and effectiveness in promoting sustainable forest management across regions of the world.<sup>105</sup>

## **2.4 Fundamental Forestry Principles**

Since the Rio Conference in 1992 two sets of forestry principles have been developed, i.e. the UNCED Agenda 21 International Forestry Principles and Non-Legally Binding Instrument on all types of forests of 2007. These lay a foundation for the international legal regime for SFM.

### ***2.4.1 The UNCED Agenda 21: International Forestry Principles***

As stated above the sensitive nature of forest issues resulted in the Earth Summit failing to create a legally-binding instrument on forests. However, an agreement was reached on numerous forest issues by the negotiators to ensure that forests are conserved and sustainably managed. The issues and consensus reached were set out as the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests highlighted in the 1992 Rio Forest Principles.<sup>106</sup> Most importantly, the link between the Forest Principles and a binding forest regime was that they will determine the agreement for a future multilateral convention, and possibly form the basis for a common legal position.<sup>107</sup>

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<sup>104</sup> The Rio Conventions (above n32, 7)

<sup>105</sup> The Rio Conventions (above n32, 8)

<sup>106</sup> “The 1992 Rio Forest Principles affirmed states’ sovereignty to exploit their own natural resources pursuant to their own environmental policies. The principles also capture states’ responsibilities to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond their national jurisdictions”. Chapter 11 of UNCED 1992a. Agenda 21, International Forestry Principles.

<sup>107</sup> For further reading see: Kunzmann, K. The Non-legally Binding Instrument on Sustainable Management of All types of Forests -Towards a Legal Regime for Sustainable Forest Management? *German Law Journal* [Vol. 09 No. 08].

#### **2.4.2 The 2007 Forestry Principles (The NLBI)/now UN Forest Instrument**

Although, it has taken the world a long time to agree on an international policy framework for SFM, in 2007 there was a landmark instrument called the NLBI on all types of forests. This is the nearest step to an international legal regime for the forestry sector. The NLBI has various strengths and weaknesses. Firstly, strengths of the NLBI include Section IV paragraph 5 of the NLBI which contains global objectives on forests.<sup>108</sup> Secondly, Section V paragraph 6 subparagraphs 6(a)-(y) of the instrument is about national policies and measures. This section highlights 25 commitments that Member States should adhere to in order to accomplish the ultimate purpose of the NLBI regarding SFM and GFG.<sup>109</sup> Thirdly, Section VI covers international cooperation and means of implementation, and paragraph 7 subparagraphs 7(a)-(s) list 19 commitments that Member States should observe in order to achieve the purpose of the NLBI.<sup>110</sup> Fourthly, this instrument recognizes the value of monitoring, assessment and reporting on its implementation. Thus Section VII covers monitoring, assessment and reporting, and paragraphs 8 and 9 stipulate necessary actions. In short, the role of international cooperation, national policies, means of implementation and monitoring, assessment and reporting are clearly articulated in the NLBI.<sup>111</sup> However, by virtue of the NLBI being non-legally binding it is powerless on issues of FLEGT, and on legal dimensions of GFG and SFM. As a result the NLBI is completely quiet on land tenure, access and user rights, and forest tenure and use rights. Though, land issues and rights are paramount to rule of law in the context of forest regulation.

#### **2.5 C&I for SFM and trade in forest products**

Nine eco-regional processes on C&I for SFM took place in 149 countries.<sup>112</sup> These processes were established and led by forest-related governmental representatives, institutions, agencies and Non-Governmental Organizations (NGOs).<sup>113</sup> The European model of C&I demonstrates the most comprehensive approach. The 2003 International Conference on the contribution of C&I for SFM (CICI, 2003) held in Guatemala City demonstrated an improved understanding and conceptualization of the concept. The nine C&I processes yielded similar results and the consensus

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<sup>108</sup> Paragraph 5 of NLBI

<sup>109</sup> Paragraph 6 of NLBI

<sup>110</sup> Paragraph 7 of NLBI

<sup>111</sup> Paragraph 8, Paragraph 9 of NLBI

<sup>112</sup> Castañeda. (above n33, 36)

<sup>113</sup> For further reading see: Tiina Vähänen. undated. Criteria and Indicators for Sustainable Forest Management and Trade in Forest Products and Services: A Background paper for the Global Project: Impact Assessment of Forest Products Trade in Promotion of Sustainable Forest Management. Global Project GCP/INT/775/JPN. FAO, Rome, Italy.

was marked by the seven common thematic areas.<sup>114</sup> However, indicators varied widely depending on forest types, and social, cultural, environmental, ecological, economic, financial and political factors.<sup>115</sup>

The series of major international and regional processes on criteria and indicators started before the landmark Rio Conference.<sup>116</sup> Currently, there is on-going harmonization of C&I for SFM.

There are a number of trade-related aspects in the C&I formulations. A review of the nine C&I formulations indicated that only two thematic areas of forests are indeed related to trade. These are those on “socio-economic functions” of forests and the “productive functions” of forests include indicators related to trade.<sup>117</sup> National level Trade-related indicators include: quantity of timber and non-timber forest products traded in local and international markets, imports and exports in timber and related forest products. Further, the magnitude at which economic and policy agendas support investment and taxation policies in the forestry sector. In addition, the extent to which economic policy and financial mechanisms make provisions for non-discriminatory trade policies for timber products.<sup>118</sup>

In order to develop and harmonise trade related C&I for SFM, the FAO is leading a two year project (2014-2015).<sup>119</sup> This project is specifically aimed at strengthening the C&I as a planning, decision-making and monitoring and reporting tool at local, national, regional and global levels. This project has already been conducted in Africa, Asia, Near East and North Africa and Latin America.<sup>120</sup> The project is implemented in partnership with the relevant regional and global C&I

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<sup>114</sup> Tiina Vähänen (above n110, 5)

<sup>115</sup> Castañeda. (above n36, 38)

<sup>116</sup> In 1992, there was the ITTO initiative on C&I for SFM with 7 criteria and 66 indicators for national forest management unit in humid tropical countries. Subsequently, in 1995 the Dry-Zone Africa process developed 7 criteria and 47 indicators for national level SFM. In 1993 and 1998 the Pan European Forest process developed 6 criteria and 27 quantitative and 101 qualitative indicators for Boreal, temperate and Mediterranean forests in countries in Europe. In 1995 the Montreal process developed 7 non-legally binding criteria and 67 indicators for temperate and boreal forests in countries outside Europe. In 1995, the Tarapoto Proposal of 1995 developed 1 global, 7 national 4 forest management unit level criteria and 7 global, 42 national and 22 forest management unit indicators for the Amazon. The Near East process developed 7 criteria and 65 indicators for the global and national level. Subsequently, in 1997 the Lepaterique of Central America developed 4 regional and 8 national criteria and 40 regional and 53 national indicators. In 1993 the African Timber Organization developed 28 criteria and 60 indicators and identified 5 principles and 2 sub-principles for ATO Member countries. Lastly, in 1999 the Regional Initiatives for Dry Forests in Asia developed 8 criteria and 49 indicators for Dry forests in Asia and at the national level. Castañeda. (above n36, 38)

<sup>117</sup> Tiina Vähänen (above n110, 5)

<sup>118</sup> Tiina Vähänen (above n110, 5)

<sup>119</sup> For more information refer to: Strengthening Criteria and Indicators (C&I) for Sustainable Forest Management (SFM) in Policy and Practice. Global FAO C&I Expert Workshop, FAO Rome, Italy 15-16 January, 2015. Available at: [www.fao.org/forestry/ci/en/](http://www.fao.org/forestry/ci/en/) (Accessed 3 September 2015)

<sup>120</sup> FAO (above n119)



processes and initiatives, i.e. the UNFF, ITTO, Montreal process, COMIFAC, ACTO and FOREST EUROPE.<sup>121</sup>

## **2.6 FAO Forest Assessment mechanisms: SFM tools**

The FAO has modelled two mechanisms that serve as planning tools for guiding SFM. These are modelled on the internationally agreed thematic elements of SFM. These are the Global Forest Resource Assessment (FRA) and the State of the World's forests Report.

### ***2.6.1 The FAO's Global Forest Resource Assessment***

The FAO has coordinated the Global Forest Assessments (FRA) since 1945 at five to ten year intervals since then.<sup>122</sup> The driving force behind these assessments is Article 1 of the FAO Constitution. The FRA adopted and uses the concept of Criteria and Indicators for SFM. The FRA has evolved in terms of scope and content in response to changing information needs at local, national, regional and international level. The driving force for the inaugural FAO-led forest resource assessment was explicitly captured in the first sentence of its report of 1948: "*The whole world is suffering from shortages of forest products*".<sup>123</sup> Surveys and baseline studies on timber demand and supply patterns were the central focus throughout the 1960s. However, between 1970 and 1990 FRA, ecological and environmental sustainability dimensions of forest resources were the main concern, precisely unsustainable forest resource use leading to exacerbated deforestation rates culminating in alarming forest degradation<sup>124</sup>. While FRA 2000 was intended to capture a broad spectrum of the multiple ecosystem functions and benefits of forests, i.e. direct benefits, indirect benefits and intermediate services of forests, lack of data hampered reporting on key regional trends.<sup>125</sup> Users of forest products and the media were largely interested in the area covered by the world's forests and its change over time, and consequently resource surveys/inventories and user surveys and mapping dominated the FRA 2005<sup>126</sup> and FRA 2010.<sup>127</sup> After reflections on timelines and progress made in GFRA it was essential to formulate a GRA that seeks to respond to short-term, mid-term and long-term global needs. As a result of these recommendations, the FAO Committee on Forestry (COFO) in its twentieth session (in 2010), requested FAO to prepare a long-term strategy for the GFRA programme with appropriate implementation mechanisms including

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<sup>121</sup> FAO (above n119)

<sup>122</sup> FAO FRA Long-Term Strategy 2012-2030. (above n42).

<sup>123</sup> FAO 2012a. (above n42, 4)

<sup>124</sup> FAO 2012a. (above n42, 4)

<sup>125</sup> FAO 2012a. (above n42, 4)

<sup>126</sup> FAO 2005a. Global Forest Resources Assessment (FRA 2005). Available: [www.fao.org/forestry](http://www.fao.org/forestry) (Accessed 6 September 2014)

<sup>127</sup> FAO. FRA 2010. (above n1)

innovative and sustainable financing. Consequently, the FRA Long-term Strategy was developed.<sup>128</sup> Key findings from FRA inform and guide SFM programmes.

### **2.6.2 FAO's flagship publication "State of the World's Forests"**

On a periodical basis of two year intervals "The State of the World's Forest Report" by FAO provides a global outlook on the forest sector in accordance with sustainable development and its environmental, economic and social pillars.<sup>129</sup> This "The State of the World's Forest Report" further applies the seven thematic elements of SFM that have been internationally agreed as a framework for SFM. The ultimate purpose of this biennial report is to assess progress towards sustainable forest management across the regions of the world.<sup>130</sup> Lately, the report focuses on socio-economic issues surrounding the world's forests, thus linking forests and sustainable livelihoods. Key findings in this report inform planning and decision-making towards SFM at national, regional and international level.

## **2.7 The World Bank Forest Policy and Strategy**

The World Bank developed a new Strategy and Operational Policy on forests, and this contemporary policy was adopted in 2002.<sup>131</sup> Improvements in this policy include the recognition that the Bank becomes proactive in supporting SFM. Ultimately, the Bank put in place safeguards for financing and investment.<sup>132</sup> This policy stipulates that the World Bank will now cover all types of forests. In addition, the policy offers a shift to old age forest conservation to sustainable forest resource use. Furthermore, this policy makes provisions for engagement and cooperation with the private sector so as to develop private sector markets and supports marketing mechanisms. Likewise, this policy includes provisions for the preservation and conservation of critical natural ecosystems and habitats in all forest types. Consequently, these provisions protect critical forest ecosystems and habitats from any financial investment that would otherwise be undesirable and detrimental, while prohibiting the Bank from funding any commercial forestry operations in critical ecosystems and habitats. Over and above that the new policy makes clear provisions for financial investment targeted at enhancing forest management outside critical forest areas in line with the stipulated requirements set out in acceptable independent certification standards. Moreover, the new

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<sup>128</sup> FAO 2012a. (above n42, 4)

<sup>129</sup> FAO 2007. (above n40)

<sup>130</sup> FAO 2007. (above n40)

<sup>131</sup> The World Bank (above n39)

<sup>132</sup> The World Bank (above n39)

policy gives a clear distinction between large scale and small scale forest operations.<sup>133</sup> However, the same high standards of SFM apply to both small and large scale operations. The encouraging news is that with small scale operations, monitoring is done by the borrower with significant local stakeholder involvement and not through formal certification requirements. Consequently, monitoring by designated government agencies, independent third parties verification schemes and by the Bank's own supervision makes sure that the forest operations contribute to the sustainable livelihoods of forest-dependent local communities.<sup>134</sup> The 2007 review of the implementation of the World Bank Forest Policy and Strategy of 2002 made recommendations for reinforcements towards increasing financing for sustainable forest management and associated development initiatives.<sup>135</sup> Furthermore, the World Bank would support the expansion of on-going work on Forest Law Enforcement and Governance (FLEG) and REDD+ (under the UNFCCC) that includes: implementation of the Forest Carbon Partnership facility to support REDD+, integrating the global forest agenda into national forest policies and strategies, strengthening attention to forests through the inclusion of the forest sector in Poverty Reduction Support Programmes and Country Assistance Strategies, and ensuring efficient application of the Bank's safeguard policy regarding traditional forest lending projects, and enhancing DDS in development policy lending by increasing participation.<sup>136</sup>

## **2.8 International Voluntary Programmes: Forest Certification**

The global trend is that many organizations and private companies from the environment and commercial forestry sectors have been proactive in signing-up for independent certification schemes, otherwise known as private labels, and did not wait for the government to set up mechanisms and systems for sustainable forest management<sup>137</sup>. Indeed several private labels and quality marks are available globally, but the two most important ones are the FSC and PEFC.<sup>138</sup> The underlying principle is that logging does not compromise the multiple functions of the forests that yield direct use benefits, indirect use benefits and intermediate use services supplied by the forests.

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<sup>133</sup> The World Bank (above n39)

<sup>134</sup> The World Bank (above n39)

<sup>135</sup> World Bank. (above n79)

<sup>136</sup> World Bank (above n79)

<sup>137</sup> Maguire. (above n22)

<sup>138</sup> For more information see: The EU portal about FLEGT and EUTR: [www.euflegt.efi.int/portal](http://www.euflegt.efi.int/portal) (Accessed 6 August 2014)

### 2.8.1 Forest Stewardship Council (FSC)

FSC is a worldwide organization that provides a system for voluntary accreditation and independent third-party certification.<sup>139</sup> This system allows certificate holders to market their products and services which have been endorsed to have met certain set principles, criteria, indicators and standards which comply with environmentally appropriate, socially beneficial and economically viable forest management practices. Basically, the FSC was established 1993, after the United Nations Conference on Environment and Development to promote “*environmentally appropriate, socially beneficial, and economically viable management of the world’s forests*”.<sup>140</sup> The full SFM framework of the FSC is underpinned by the following set of principles: Principle 1: Compliance with Laws; Principle 2: Workers’ Rights and Employment Conditions; Principle 3: Indigenous Peoples’ Rights; Principle 4: Community Relations; Principle 5: Benefits from the Forest; Principle 6: Environmental Values and Impacts; Principle 7: Management Planning; Principle 8: Monitoring and Assessment; Principle 9: High Conservation Values; and Principle 10: Implementation of Management Activities.<sup>141</sup> These principles go beyond the C&I for SMF alluded to earlier, and include issues of forest governance. However there is a glaring omission of any form of DDS currently. Nonetheless the FSC has started to move towards a DDS as a way of alignment with the EUTR.<sup>142</sup> In addition, this being a voluntary scheme does not directly combat illegal logging but encourages best practice and promotes SFM. Most recently, though the FSC is reported to have made massive effort to align and harmonize itself in order to comply with the requirements of the EUTR.<sup>143</sup> In addition, the FSC has launched an online claim platform (OCP) to track records of FSC-certified suppliers.<sup>144</sup>

### 2.8.2 Programme for the Endorsement of Forest Certification schemes (PEFC)

The PEFC Council is an international organisation endorsing sustainable forest management through forest certification and labelling of forest-based products. Products with a PEFC claim and/or label offer guarantees that the raw materials used in the manufacturing of the product

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<sup>139</sup> The FSC started after the breakdown of negotiations on a legally-binding forest instrument in Rio 1992. For more details see: FSC. (above n63)

<sup>140</sup> FSC. (above n63, 7)

<sup>141</sup> FSC. (above n63, 7)

<sup>142</sup> FSC (above n63, 12-22)

<sup>143</sup> <sup>143</sup> Trishkin M.I., Lopatin, E. and Karjalainen, T. 2015. Exploratory Assessment of a Company’s Due Diligence System against the EU Timber Regulation: A Case Study from North western Russia. *Forests* 2015, 6:1380-1396: doi:10.3390/f6041380

<sup>144</sup> FSC Online Claim Platform, 2014. Available online: <http://ocp-info.fsc.org/> (Accessed on 16 July 2015).

originate from sustainably-managed forests.<sup>145</sup> The PEFC Council approves national forest certification schemes which comply with PEFC Council standards. The PEFC Council addresses this point by incorporating national forest certification schemes and standards which are suitable and adaptable to local situations.<sup>146</sup> Although DD is not part of the PEFC system yet, the Chain of Custody standard has had some of its aspects adjusted to make sure it can serve as a DDS and this partially aligns with the EUTR.<sup>147</sup> Furthermore, this voluntary programme does not deal directly with illegal logging, but promotes SFM. It has been reported that both the FSC and the PEFC are more than happy to oblige with the requirements of the EUTR (2013).<sup>148</sup>

## **2.9 Interim conclusion**

The series of instruments described above form a firm foundation that guides the international forestry regime. In addition, these tools and mechanisms have informed the development of global/fundamental forestry principles. Most importantly, the international forest processes and dialogues have contributed to the development and implementation of the regional FLEGT initiatives. The next chapter will formulate and develop a theoretical framework for an effective and equitable international regime to support GFG and guide the international regulation of SFM.

## **3.0 Essential Theoretical Components of a Regional Legal Regime for Promoting Sustainable Forest Management and Good Forest Governance in Africa**

This chapter provides a context on the current status of the international forestry regime and reiterates the need for an equitable legal forest regime that would enhance FLEGT, promote GFG and support SFM. Subsequently, a theoretical framework derived from a set of interrelated specific substantive legal issues/themes and three accompanying cross-cutting themes is discussed. The theoretical framework is used to critique the EU FLEGT in the next chapter. An interim conclusion concludes the chapter.

## **3.1 The context**

The breakdown of international negotiations regarding an international forest convention led to the NLBI. The NLBI has not managed to set the yardstick for FLEGT, SFM and GFG. This has

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<sup>145</sup> The sustainability principles of the PEFC are based on the C&I for SFM., for more information see: PEFC (above n61)

<sup>146</sup> PEFC (above n64, 4)

<sup>147</sup> EU portal about FLEGT and EUTR (above n138)

<sup>148</sup> EU portal about FLEGT and EUTR (above 138)

resulted in the continued absence of an international forest convention. Consequently, States continue to embrace an assortment of regulatory mechanisms and voluntary schemes. Some examples are the FLEG/T model and international voluntary programmes like the FSC and PEFC.<sup>149</sup> These emerging forest regimes seek to address the problems of indiscriminate deforestation, forest degradation, poor forest management and alarming illegal logging.<sup>150</sup> However, recent studies have indicated that these problems continue to persist in most parts of the world, especially in Africa.<sup>151</sup> Consequently, there is a need for an effective and equitable legal regime to support FLEGT and promote GFG and SFM. The focus of this study was to develop a comprehensive framework that would form the foundation and basis for a more potent legal regime. The main determinants of the framework for an effective and equitable legal regime included the challenges that currently persist in the forest sector. Subsequently, in-depth analyses of the internationally agreed GFG and SFM frameworks further informed some aspects of the framework. In addition, the framework was inspired by recent studies on the international regulation of SFM including doctrinal concepts, governing institutions and implementation.<sup>152</sup> The framework comprises twelve specific substantive legal issues grouped into a series of interrelated themes. In addition, these specific themes are accompanied by three broad cross-cutting themes and discussed in the next sections.

### 3.2 The Theoretical framework

The theoretical framework is constituted by twelve substantive themes and three cross-cutting themes (see Table 1).

**Table 1: Legal themes that underpin the theoretical framework**

Substantive themes	Cross-cutting themes
<ol style="list-style-type: none"> <li>1. Security/clarity on land tenure, ownership and use rights</li> <li>2. Stable institutional structures</li> <li>3. Clear environmental and forestry standards</li> <li>4. Effective and equitable approval processes</li> <li>5. Participatory, transparent and accountable decision-making</li> <li>6. Cooperation and coordination procedures</li> </ol>	<ol style="list-style-type: none"> <li>1. Clear, coherent and consistent law and policy</li> <li>2. Adherence/respect of the rule of law</li> <li>3. Knowledge, capacity and resources</li> </ol>

<sup>149</sup> Maguire. (above n12, 67, 250, 263)

<sup>150</sup> Derky, M, A.F. Ros-Tonen, AFM, Kyereh, B. and Diet, T.. Emerging forest regimes and livelihoods in the Tano Offin Forest Reserve, Ghana: Implications for social safeguards. *Forest Policy and Economics* 32 (2013) 49–56. Available: [www.elsevier.com/locate/forpol](http://www.elsevier.com/locate/forpol). (Accessed 19 May 2015)

<sup>151</sup> Husgafvel (above n41, 12-30)

<sup>152</sup> Maguire. (above n22, 14-29)

7. Monitoring, evaluation and reporting 8. Effective compliance and enforcement 9. Financial incentives 10. Equitable sharing of benefits 11. Conflict resolution procedures 12. Mixture of regulatory approaches-direct regulation and voluntary mechanisms	
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Source: Author

### 3.2.1 The specific substantive legal issues/themes

#### *1. Security and clarity on land tenure, access, ownership and use rights*

In the NLBI of 2007 Member States could not reach an agreement on critical issues such as security and clarity on land tenure. However, in order to effectively promote GFG and SFM a legal framework for FLEGT must support and clarify the security of land tenure, ownership, and access and user rights.<sup>153</sup> Firstly, the legislation must recognize customary laws and traditional rights of local communities, indigenous people and other traditional forest users (including non-resident users).<sup>154</sup> Formal and informal rights for forest goods and services should be treated equally; the former should not supersede the latter as it is the trend nowadays. The legislation must make sound provisions for equitable and effective conflict and dispute resolution mechanisms over tenure and rights.<sup>155</sup> Secondly, the laws should provide for sound administration of land tenure, forest tenure and tree tenure.<sup>156</sup> This entails documentation and easy access to comprehensive data and other relevant information on forest tenure, tree tenure and associated rights. For example, in cases where rights are interfered with, due processes should be clearly outlined and adhered to regarding compensation for loss of rights.<sup>157</sup> Furthermore, the law must make provisions for concrete measures and instruments to safeguard security of tenure for forest owners and right holders.<sup>158</sup> Land tenure, access, ownership and user rights are fundamental to all the subsequent themes in this series. For example, the rule of law requires clear rights for effective and equitable forest regulation. Further, clarity on land tenure and use rights is a key principle for basic responsible forest management.

<sup>153</sup> Legal framework to support and protect land tenure, ownership and use rights is vital for FLEGT. For further reading see: FAO PROFOR 2011 (above n25)

<sup>154</sup> FERN. (above n19, 7, 10, 17, 24).

<sup>155</sup> World Bank. (above n75).

<sup>156</sup> World Bank (above n75, 41)

<sup>157</sup> VPA EU-Ghana Article 17. This article is included in all VPAs but the way it is formulated may differ.

<sup>158</sup> World Bank (above n752, 17)

## *2. Stability of institutional structures*

General stability and robustness of lead forest institutions in government, civil society, local communities and private sector is imperative for GFG and SFM.<sup>159</sup> This includes a high level of competency of authorities and other functionaries in addressing the various aspects of GFG and SFM.<sup>160</sup> Frequent changes within lead institutions may lead to instability and negative impacts on the implementation of planned and on-going forest programmes. Smooth implementation of programmes also requires very clear and mutually supportive mandates for all entities involved in the forestry sector (i.e. national and sub-national governments, civil society, local communities and the private sector).<sup>161</sup> In addition, adequate physical, human and financial capacities including reliable budgets play a significant role in implementing programmes for GFG and SFM.<sup>162</sup> Availability of skilled human resources and appropriate infrastructure and technology and quality and effective knowledge management systems are vital for various agencies to deliver on their mandate.<sup>163</sup> Appropriate and well capacitated institutional frameworks and suitable institutional arrangements are paramount in the effective and efficient implementation of FLEGT, GFG and SFM.

## *3. Clear social, environmental and forestry standards*

An ideal international legal regime would need to analyse the internationally agreed 7 thematic elements of SFM and the respective pillars and principles of GFG in order to understand the role of law in implementing SFM and GFG. This analysis would culminate in the law identifying and analysing all the values, interests and services enshrined in the concepts of SFM and GFG and thereby setting out guidelines, standards and in some instances regulations for SFM and GFG. However, in the interim, the NLBI of 2007 which is perceived as the last step towards a legal regime for SFM sets new standards for international forest policy under sub-paragraph 7(g). These standards combine legality and sustainability as criteria and conditions for GFG and SFM.<sup>164</sup> In addition, voluntary mechanisms such as the FSC and PEFC set out consistent, coherent and equitable standards for SFM. This is in line with sub-paragraph 6(x) of the NLBI which recognizes the value of voluntary mechanisms such as the FSC and others.<sup>165</sup> The FSC for example, has a standard based on 10 principles and a set of criteria for forest stewardship which represents a global

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<sup>159</sup> FAO PROFOR (above n25, 11)

<sup>160</sup> World Bank (above n75, 22)

<sup>161</sup> World Bank (above n75, 22, 23)

<sup>162</sup> World Bank (above n75, 22, 26)

<sup>163</sup> FAO PROFOR (above n75, 23)

<sup>164</sup> Paragraph 7 of NLBI

<sup>165</sup> Paragraph 6 of NLBI



consensus amongst all FSC members across the world.<sup>166</sup> These were developed in 1994 and last revised in 2012 through an extensive consultative process. The PEFC Council on the other hand has developed and published 2 sets of “Requirements for SFM standards” made up of 7 criteria.<sup>167</sup> Members of these voluntary certification bodies adhere to these standards, and these could effectively complement any emerging forest regime. Ultimately a future international forest regime, as envisaged by the NLBI, that would create forestry standards based on capacity and a new system of liability is desirable. Consequently, there would be sets of internationally agreed standards, i.e. standards for developed countries and standards for developing countries. The new system of liability would recognize the role of developed countries in stimulating unsustainable forest practices.<sup>168</sup> Clear environmental and forest safeguards are imperative for SFM, and they are crucial for FLEGT and GFG. These standards guarantee social safeguards and equity in the forestry sector.

#### *4. Effective and equitable approval processes*

The rise of the emerging forest regimes to curb illegal logging has introduced complex processes and procedures. Such processes are those that seek to prove the legality status of the timber and associated timber products. Examples include the US Lacey Amendment Act of 2008, the Australia Illegal Logging Prohibition Act of 2012 and the EUTR of 2010. These laws have stringent but crucial due diligence systems that seek to reduce marketing of illegal timber to the bare minimum.<sup>169</sup> Moreover, before the adoption of trade agreements that come with these robust legal regimes, tropical timber producing countries first need to go through numerous complex policy and legislative reform processes. Government, civil society, local communities and the private sector and other stakeholders need to engage and reach a consensus on various policy and legislative issues regarding SFM and GFG.<sup>170</sup> Effective and equitable approval processes would be ideal for smooth legal timber trade as opposed to these cumbersome processes. Nonetheless, the on-going review of the EUTR might bring a solution to this problem. Effective and equitable approval processes often involve different stakeholders, and government is the central focus. This normally promotes transparency, probity and accountability and enhances public participation.

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<sup>166</sup> FSC (above n63)

<sup>167</sup> PEFC (above n64)

<sup>168</sup> Maguire. (above n22, 18, 292)

<sup>169</sup> See the EUTR for more detail.

<sup>170</sup> FERN. (above n19)

## 5. *Transparency, accountability, and public participation*

In paragraph 6 sub-paragraph 6(a) to 6(y) the NLBI outlines 25 commitments which form the basis for concrete national-level priority actions which Member States should adopt and implement to achieve SFM and GFG.<sup>171</sup> Consequently, transparency, accountability, and public participation form one of the five building blocks that underpin GFG and ultimately promote effective SFM, and the law must support it.<sup>172</sup> Firstly, transparency in the forest sector such as timely public access to comprehensive high quality information is important.<sup>173</sup> Such information may include forest data, strategies, plans, budgets, policies, laws, and other relevant information considered important for forest use and management. Furthermore, transparency in the allocation of concessions, permits and forest user rights is key for GFG.<sup>174</sup> Secondly, this concept involves devolution, decentralization and participatory forestry.<sup>175</sup> Public participation in forestry promotes democratic forest management and inclusivity in decision-making.<sup>176</sup> Thirdly, the accountability of forestry officials to stakeholders is of paramount importance in promoting GFG and ultimately moving towards SFM.<sup>177</sup> The law should compel officials to divulge information on allocation of concessions, permits and user rights for timber and related forest goods and services. Lastly, to realize GFG and SFM, accountability of forest agencies is imperative.<sup>178</sup> Public forest administration should declare revenue collection and redistribution and audit reports should be an „open book“ accessible to all stakeholders.<sup>179</sup> In addition, the law must support transparency, probity and accountability of civil society organizations, local communities-driven operations and private businesses in the forest sector.<sup>180</sup> The law must make provisions for the appointment of external independent monitoring organizations to check adherence to the principles of transparency and accountability.<sup>181</sup>

Transparency, accountability and multi-stakeholder participation form a firm foundation for cooperation, effective compliance and improved enforcement.

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<sup>171</sup> Paragraph 6 of NLBI

<sup>172</sup> FAO PROFOR (above n25, 11)

<sup>173</sup> World Bank (above n75, 6)

<sup>174</sup> World Bank (above n75, 10)

<sup>175</sup> World Bank (above n75, 13)

<sup>176</sup> World Bank (above n75, 22)

<sup>177</sup> World Bank (above n75, 22)

<sup>178</sup> FAO PROFOR (above n25, 16)

<sup>179</sup> FAO PROFOR (above n25, 16)

<sup>180</sup> FAO PROFOR (above n25, 16)

<sup>181</sup> For more detail see: FAO PROFOR 2014. Assessing Forest Governance: A Practical Guide to Data Collection, Analysis, and Use. (above n78)

## 6. *Cooperation and coordination procedures*

A paradigm shift to a multi-sectoral approach in executing FLEGT, SFM and GFG is necessary.<sup>182</sup> Various policies and legislation should be coordinated and all relevant institutions should cooperate. Consequently, proper and adequate cooperation and coordination between all actors in forest and forest-related activities are essential elements in the quest for GFG and SFM.<sup>183</sup> Legislation must make provisions for frameworks and mechanisms for the coordination of forest activities between and within government departments, civil society organizations, local communities and the private sector.<sup>184</sup> Thus appropriate cooperation and coordination amongst agencies responsible for FLEGT and at all levels is a precondition for GFG and SFM.<sup>185</sup> Hence the legislation should ensure that cooperation and coordination on forest-related activities is extended beyond forest agencies to other sectors (i.e. agriculture, mining, communication, finance, etc.). In addition, cooperation and coordination of law enforcement agencies and customs is crucial for effective and efficient compliance and enforcement.<sup>186</sup> Linkages between local forest plans, national policy and legislation, regional protocols, strategies and policies and international obligations and trans-boundary cooperation are critical for the successful implementation of FLEGT, GFG and SFM.<sup>187</sup> At the global level, the NLBI under paragraph 7, on International Cooperation and Trade, contains 19 commitments of States with respect to international cooperation and trade in timber and timber products.<sup>188</sup> Cooperation and coordination are vital for improved policy and legislation alignment, enhanced compliance and enforcement in the forestry sector.

## 7. *Monitoring and evaluation (M&E) and reporting*

The NLBI supports monitoring, assessment and reporting as a key thematic area.<sup>189</sup> This underscores the significant role of monitoring, evaluation and reporting in decision-making for advancing FLEGT, GFG and SFM.<sup>190</sup> M&E forms the basis for the assessment of the effectiveness of FLEGT, GFG and SFM frameworks and programmes and informs future improvements.<sup>191</sup> Information processing and dissemination mechanisms should be transparent and accessible to the

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<sup>182</sup> FAO PROFOR (above n25, 18)

<sup>183</sup> FAO PROFOR (above n78, 112)

<sup>184</sup> FAO PROFOR (above n78, 112)

<sup>185</sup> Maguire. (above n22, 60)

<sup>186</sup> Maguire. (above n22, 78)

<sup>187</sup> FAO PROFOR (above n25, 14)

<sup>188</sup> Paragraph 7 of NLBI

<sup>189</sup> Section VII Paragraph 8 of NLBI

<sup>190</sup> Husgafvel. (above n41, 49).

<sup>191</sup> Husgafvel. (above n41, 91).

public and all interested parties.<sup>192</sup> Results of monitoring and evaluation should be utilized in forest management plans.<sup>193</sup> M&E further reveals challenges and opportunities in programmes implementation in order to enable forest agencies to timeously strengthen opportunities and device strategies to address challenges in FLEGT, GFG and SFM. Monitoring and evaluation and reporting is highly essential in identifying implementation gaps and therefore effecting improvements for enhanced and effective compliance and enforcement.

#### 8. *Effective compliance and enforcement*

Effective and efficient FLEGT should be based on the rule of law criteria where the law is sufficiently general, publicly promulgated, prospective, clear and intelligent, free of contradiction/coherence and sufficiently constant.<sup>194</sup> Furthermore, the efficacy of a legal regime for forestry sector can be enhanced by four key elements that include: consistency, comprehensiveness, subsidiarity and applicability.<sup>195</sup> In addition, effective compliance and law enforcement can be improved by rationalizing policy and legal environment for FLEGT. Firstly, by increasing clarity, transparency and consistency of forest and forest-related legislation, improving cross-sectoral linkages and securing land tenure, forest tenure and tree tenure (forest land ownership rights).<sup>196</sup> Secondly, through minimizing bureaucracy, streamlining legal procedures and simplifying Regulations so as to increase the competitiveness of legal operations. Furthermore, compliance may be improved by enhancing the capacity of the customs, police, judiciary and other actors to act effectively on forestry law matters.<sup>197</sup> Over and above that, paragraph 6 sub-paragraph 6(n) outlines the necessary processes and steps towards strengthening forest law enforcement, improving good governance to support SFM. Ultimately, this would create a good platform for forest investment and aid against illegal logging through enforcement of domestic forest laws and other laws of relevance to forestry. In line with this, the NLBI focuses on several key thematic areas including effective forest law enforcement in line with national legislation and cross-sectoral policy and programmes as a means to achieve the ultimate goal of SFM.<sup>198</sup> Effective compliance and enforcement guarantees success in FLEGT.

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<sup>192</sup> Husgafvel. (above n41, 51).

<sup>193</sup> Husgafvel. (above n41, 49).

<sup>194</sup> Maguire. (above n22, 272)

<sup>195</sup> Husgafvel. (above n41, 52).

<sup>196</sup> For further reading see: FAO Best practice for improving law compliance in forestry. (above n28).

<sup>197</sup> FAO (above n18, 48-49)

<sup>198</sup> Paragraph 2 (b); Paragraph 6 (n); Paragraph 7 (h) and (j) of NLBI

#### *9. Financial incentives and economic instruments for sustainable use*

Legislation should make provisions and mechanisms for financial and economic incentives for participating in activities that enhance FLEGT, GFG and SFM.<sup>199</sup> For example, provision of economic incentives to local communities and indigenous people for sustainable forest resource use is perceived key to achieving Goal 7 of the MDGs. Financial incentives may be made available through innovative mechanisms for equitable sharing of revenues accruing from forest resources.<sup>200</sup> The legislation should accordingly make provisions for measures and disincentives for inappropriate forest resource use and non-compliance with policies and legislation such as distortions of forest products prices and illegitimate subsidies.<sup>201</sup> To support this, paragraph 7 subparagraph 7(d) of the NLBI makes provisions for positive incentives to developing countries to reduce forest loss, engage in afforestation, reforestation and rehabilitation of degraded forests, and to implement SFM and increase forest protected areas.<sup>202</sup> Compliance and enforcement are a subject of a motivated community. Motivated local communities will participate in curbing illegal activities in adjacent forests. This will enhance compliance and enforcement and promote GFG and SFM.

#### *10. Equitable sharing of forest benefits amongst stakeholders*

In order to promote GFG, the legislation must provide mechanisms for equitable sharing of all benefits.<sup>203</sup> Examples may include sharing of benefits from forest revenue and fair and just access and use rights to forest resources in state-owned properties. Legislation should make provisions for fair and just land tenure, forest tenure and tree tenure.<sup>204</sup> Furthermore, the law should also provide for equitable allocation of benefits arising from wide utilization of knowledge, innovation and practices of local communities and indigenous people, i.e. for issues of GFG and SFM. The legislation must also make provisions for the equitable sharing of both costs and benefits of conservation amongst stakeholders.<sup>205</sup> Equity in allocation of forest benefits promotes public

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<sup>199</sup> FAO PROFOR (above n25, 15)

<sup>200</sup> FAO PROFOR (above n25, 15)

<sup>201</sup> FAO PROFOR (above n25, 15)

<sup>202</sup> For further information see: Paragraph 7 (d) of NLBI

<sup>203</sup> Benefit sharing entails “legal basis of benefit sharing, design of benefit sharing arrangements and implementation of benefit sharing arrangements”. Davis. C., Williams. L., Lupberger. S., and Daviet. F.. 2013 (47). Assessing Forest Governance: The Governance of Forests Initiative Indicator Framework. World Resource Institute. Available: [www.wri.org](http://www.wri.org) (Accessed 2 November 2014)

<sup>204</sup> Ramcilovic-Suominen (above n65)

<sup>205</sup> Husgafvel. (above n41, 232).

participation in FLEGT, GFG and SFM processes.<sup>206</sup> Good management of public sector finance in the forest sector ensures that the revenues are collected and spent on the public owners of the forest resource.<sup>207</sup> This is in keeping with sub-paragraph 7 (f) of the NLBI which strongly supports the use of traditional and indigenous knowledge with the consent of local communities and indigenous people.<sup>208</sup> Forest stakeholders are motivated by equitable benefit sharing, and would endeavour to support FLEGT, GFG and SFM.

### *11. Equitable conflict resolution procedures*

The law should provide for effective mechanisms and processes for conflict management to avoid violence by forest users.<sup>209</sup> This would allow smooth processes for resolving conflicts and disputes over forest resources and issues of land tenure, forest tenure, and tree tenure and associated rights. For example, mega-land acquisitions by industrial foreign forest companies are in direct conflict with customary land policies and laws.<sup>210</sup> Therefore, conflict resolution should consider fair and just compensation instruments for lost rights. On another note, legislation must also seek to address the unresolved conflict between formal and informal rights which often trigger conflicts between local communities and the industry.<sup>211</sup> Conflicts are disruptive to FLEGT, GFG and SFM processes as they derail cooperation and coordination of forest activities and shift mandates of forest agencies. Conflicts and disputes derail FLEGT, and often have negative impacts on SFM. Reconciliation ensures effective cooperation and coordination.

### *12. Mixture of regulatory approaches (direct regulation and voluntary mechanisms)*

Direct regulation and voluntary mechanisms differ in principles, institutions and procedures. In the absence of an international legally-binding instrument on forests, direct regulation lacks internationally agreed forest standards. Voluntary programmes therefore remain a complementary mechanism to national forest laws. Moreover, as per sub-paragraph 6 (x) of the NLBI a mixture of regulatory and voluntary mechanisms is the most appropriate combination for advancing FLEGT, GFG and SFM.<sup>212</sup> It has been observed that at present the forest sector laws lack internationally

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<sup>206</sup> Davis. et al (above 203, 47)

<sup>207</sup> “Transparent and accountable governance of forest revenues is critical to ensuring that proceeds from management of forest resources support positive social and environmental outcomes, including local development objectives”. Davis. et al (above 203, 45)

<sup>208</sup> Paragraph 7 (f) of NBLI

<sup>209</sup> World Bank (above n75, 39)

<sup>210</sup> World Bank (above n75, 26)

<sup>211</sup> FAO PROFOR (above n75, 17)

<sup>212</sup> “paragraph 6 (x) Encourage the private sector, civil society organizations and forest owners to develop, promote and implement in a transparent manner voluntary instruments, such as voluntary certification systems or other appropriate

agreed legal principles, criteria, indicators and standards for both GFG and SFM. Hence the role of law in GFG and SFM remains very unclear.<sup>213</sup> On the other hand voluntary mechanisms such as the FSC and the PEFC already have equitable, consistent and coherent standards for forest stewardship which are based on extensive stakeholder consultations. Furthermore, based on their principles and criteria, these standards embrace social, environmental and economic considerations as observed in the internationally agreed frameworks for both GFG and SFM. Forest laws emphasize on legality as a basis for sustainability, while voluntary mechanisms are built around sustainability principles. Consequently, there is a huge potential for collaboration and complementarity. This directly influences effective compliance and enforcement in the forestry sector, and promotes GFG and therefore creates an enabling environment for SFM.

### 3.2.2 The cross-cutting themes

#### *1. Clear, coherent and consistent law and policy*

Effective implementation of FLEGT, GFG and SFM requires quality, clear and coherent policies, laws and regulations governing forest use and management.<sup>214</sup> Forest policies must be realistic and implementable while laws and regulations should be easily enforceable and must avoid legal overreaching and unnecessary requirements.<sup>215</sup> Policies must be consistent with other relevant national policies, and be in harmony with relevant regional agreements and international instruments.<sup>216</sup> Forest laws must be consistent with other national laws of relevance as well as regional protocols and international obligations and commitments.<sup>217</sup> Consequently, there shall be a clear orientation towards effective cross-sectoral, coherent, coordinated and holistic approach to FLEGT, GFG and SFM. Furthermore, as highlighted earlier the NLBI supports actions for alignment and synchronization of cross-sectoral policies and programmes for ease of implementation. Subsequently, governance and forest law enforcement and compliance would be improved, thus curbing illegal logging.

#### *2. Coherence of legislation and rule of law (respect of rule of law)*

The existence of quality national forest legislation, adequate forest law enforcement, quality forest adjudication, and recognizing, honouring and enforcing property rights are fundamental principles

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mechanisms, through which to develop and promote forest products from sustainably managed forests harvested according to domestic legislation, and to improve market transparency”

<sup>213</sup> Maguire. (above n22, 15)

<sup>214</sup> FAO PROFOR (above n25, 14)

<sup>215</sup> FAO PROFOR (above n25, 14)

<sup>216</sup> FAO PROFOR (above n25, 14)

<sup>217</sup> FAO PROFOR (above n25, 14)

of the rule of law.<sup>218</sup> An equitable legal regime would have to embrace these principles in order to advance FLEGT, GFG and SFM. Protection of property rights and the effectiveness and independence of the judiciary or arbitrary body in dealing with FLEGT issues are the cornerstone of a contemporary legal regime seeking to promote GFG and SFG.<sup>219</sup> For example, illegal logging, corruption and violation of forest law undermine the rule of law. Furthermore, the forest regime must seek to fulfil all the requirements of the rule of law by providing mechanisms for applications of the rules by well-established institutions.<sup>220</sup> Conversely the law must put mechanisms to allow for departure from the rules according to laid down procedures.<sup>221</sup> There should be provisions to the effect that conflict in application of these rules be handled by an independent judiciary or arbitrary body through legally-binding decisions.<sup>222</sup> The law must give provisions for clear procedures for the amendment of rules from time to time.<sup>223</sup>

### 3. *Knowledge, capacity and resources*

The capacity and effectiveness of public forest administrations and other forest agencies is pivotal in delivering their mandates in FLEGT, GFG and SFM programmes<sup>224</sup>. Adequate capacity inspires public confidence in the forest agencies.<sup>225</sup> Forest policies and legislation should support capacity building at all levels in the forest sector.<sup>226</sup> Capacity can be stimulated firstly by the quality of human resources, their knowledge and skills.<sup>227</sup> Secondly, capacity and effectiveness of forest agencies can be enhanced by predictable and reliable budget allocations.<sup>228</sup> Thirdly, efficiency can be improved by the existence of appropriate infrastructure, equipment and tools.<sup>229</sup> Forest policies and laws must support and promote quality forest resource management, quality forest information systems, strategic planning and a strong focus on GFG and SFM.<sup>230</sup> Forest laws should support physical capacities, human capacities and financial capacities of law enforcement institutions that play a role in the forest and related sectors.<sup>231</sup> In turn this guarantees effective and efficient institutions as may be reflected in the level of responsiveness to forest crimes and associated

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<sup>218</sup> Maguire. (above n22, 15, 272)

<sup>219</sup> Maguire. (above n22, 272)

<sup>220</sup> Maguire. (above n22, 272)

<sup>221</sup> Maguire. (above n22, 272)

<sup>222</sup> Maguire. (above n22, 272)

<sup>223</sup> Maguire. (above n22, 272)

<sup>224</sup> FAO PROFOR (above n25, 16)

<sup>225</sup> FAO PROFOR (above n25, 16)

<sup>226</sup> FAO PROFOR (above n25, 16)

<sup>227</sup> FAO PROFOR (above n25, 16)

<sup>228</sup> Husgafvel. (above n41).

<sup>229</sup> Husgafvel. (above n41).

<sup>230</sup> Husgafvel. (above n41).

<sup>231</sup> Husgafvel. (above n41).



dealings. Legislation must make provisions for clear mechanisms to enhance capacity, knowledge and skills for the effectiveness of police, customs officials, judiciary, prosecutors and courts in forest matters.<sup>232</sup> Forest laws should make provisions for stakeholder capacity and action in civil society, local communities and indigenous people and small and medium forest enterprises.<sup>233</sup> This would encourage and enable their meaningful participation in FLEGT, GFG, and SFM processes. Legislation must support capacity for adoption of voluntary social and environmental standards and safeguards.<sup>234</sup> By so doing private sector actors such as banks financing forest businesses would be aware of international codes of conduct, standards and safeguards. This would enhance compliance and further improve effectiveness and efficiency of GFG and SFM programmes. Most importantly, the preferred new international forest regime would be one that recognizes the discrepancies in capacities between developed and developing countries.

### **3.2.3 Interim conclusion**

The theoretical framework forms the basis of a potentially effective and equitable legal regime for supporting FLEGT, GFG and SFM. This framework takes into consideration the contemporary legal analysis and commentary on challenges and opportunities for the emerging forest regimes, including international forestry principles, including the NLBI, and international voluntary programmes. In addition, the principles and context of relevant multilateral environmental agreements and principles and pillars of GFG and C&I for SFM have been infused into this framework. Consequently, the framework can therefore be used as a benchmark for the EU FLEGT Scheme which is perceived as the most contemporary legal regime. Hence, the next chapter provides a critical assessment of the EU FLEGT Scheme against this framework.

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<sup>232</sup> Husgafvel. (above n41).

<sup>233</sup> Maguire. (above n22)

<sup>234</sup> Maguire. (above n22)

## **4.0 A Critical Review of the EU FLEGT Scheme**

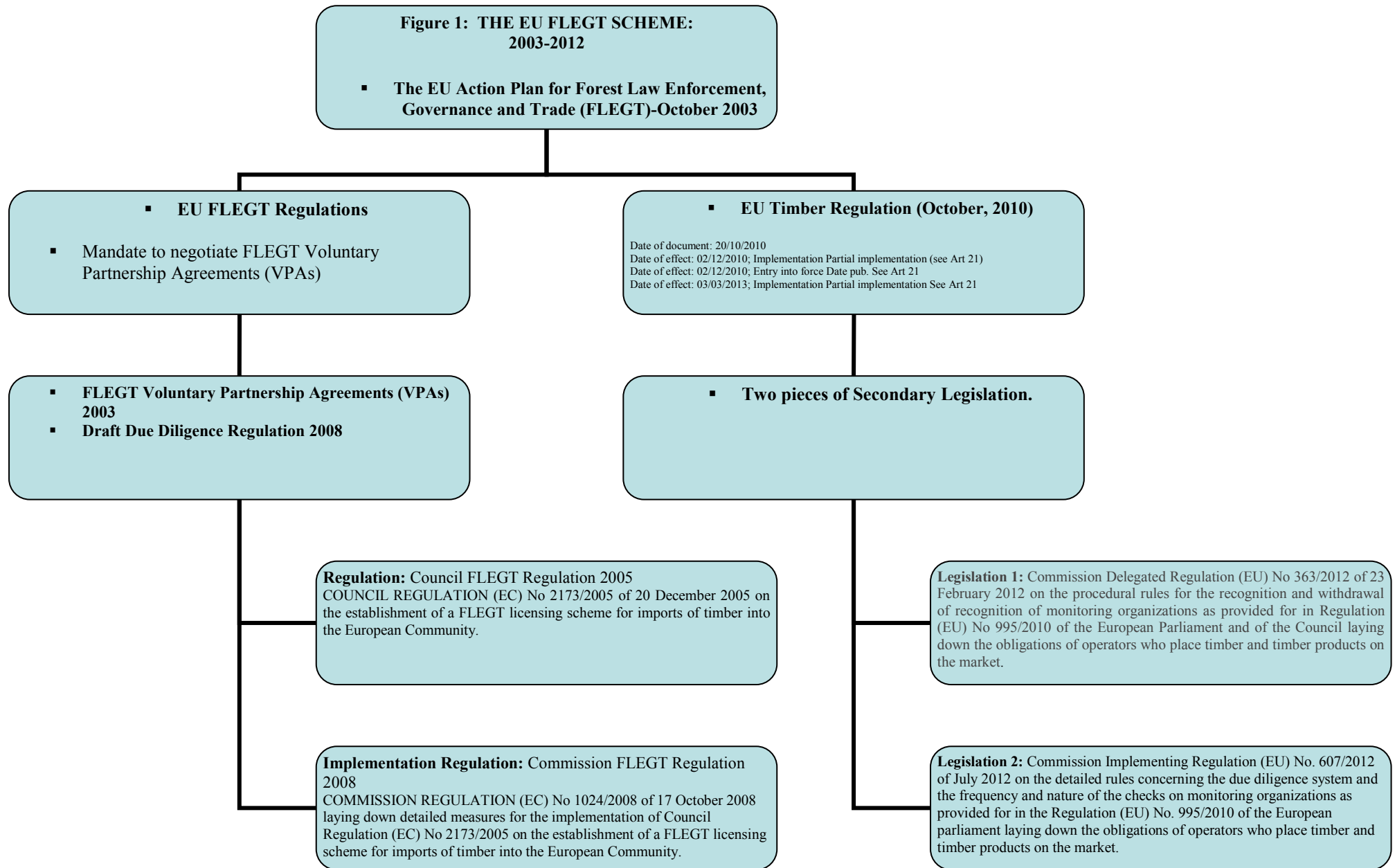
This chapter starts with an overview of the EU FLEGT Action Plan, and the hierarchy of instruments that emanated from this plan. This is followed by a critical evaluation of the EU FLEGT Scheme (i.e. the Action Plan and associated instruments) with reference to the theoretical framework distilled in chapter 3. The chapter ends with an interim conclusion of the evaluation.

### **4.1. Overview of the EU FLEGT Scheme**

The fundamental pillars of the FLEGT Action Plan are built around interrelated measures: (i) providing support to timber exporting countries, including action to promote equitable solutions to the illegal logging problem; (ii) supporting activities to promote legal timber trade; (iii) promoting robust and efficient public procurement policies in all EU countries as well as in any country that consumes timber, including policies encouraging the purchase of timber from legal origin; (iv) support for private sector initiatives, including action to promote good practices and stewardship and use of voluntary codes of conduct; (v) promoting safeguards for financing and investment, including action to develop due care procedures; (vi) use of existing legislative instruments or adoption of new legislation to support the Action Plan; and (vii) addressing the problem of conflict timber.<sup>235</sup> In order to implement the measures listed above, a hierarchy of interrelated regulations was put in place in a logical sequence which started with the EU FLEGT Regulations whose mandate was to negotiate FLEGT VPAs. A schematic representation of the hierarchy of the EU FLEGT is presented in Figure 1. The next section provides an overview of the EU FLEGT Scheme.

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<sup>235</sup> EU (2007a). Briefing Note Number 1: What is FLEGT? FLEGT Briefing Notes (2007 series). Brussels: EC [http://ec.europa.eu/development/policies/9interventionareas/environment/forest/flegt\\_briefing\\_notes\\_en.cfm](http://ec.europa.eu/development/policies/9interventionareas/environment/forest/flegt_briefing_notes_en.cfm).



#### 4.1.2. EU FLEGT Action Plan

Preceding the approval of the EU FLEGT Action Plan of 2003 was the Commission Communication of 21 May 2003 entitled „Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan“. The European Parliament and the Council welcomed that Communication and acknowledged the need for the EU to partner with the international world in the quest to combat illegal logging.<sup>236</sup> The FLEGT Action plan gave rise to two policy and legislative instruments that complement each other i.e. the VPAs and the EUTR (see Figure 2).<sup>237</sup> Both instruments are aimed at curbing illegal logging and associated trade, the former aimed at timber producing/exporting countries, and the latter at EU importers.<sup>238</sup> Through the EU FLEGT Action Plan the EU Council urged the EC and Member States to put effort into improving forest governance, firstly, by strengthening land tenure, forest tenure, tree tenure and access and use rights, especially for marginalised rural communities. Secondly, by strengthening full and effective involvement, engagement and participation of all stakeholders and role players, including civil society and local communities in policy processes. Thirdly, by introduction of independent monitoring and auditing. Fourthly, through increasing transparency, honesty and accountability in award and issuance of forest concessions in forest harvesting operations and timber trade. Ultimately, by improving engagements with the private sector on FLEGT issues.<sup>239</sup>

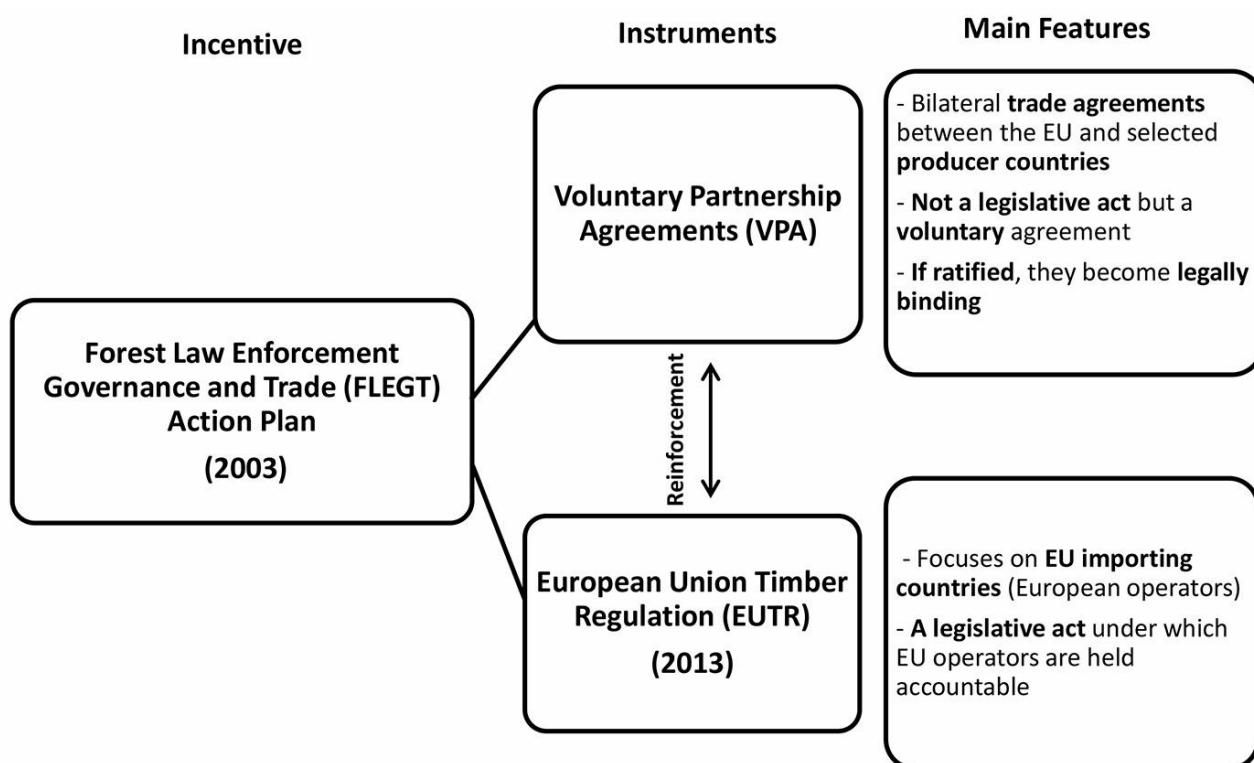
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<sup>236</sup>EU (above n235)

<sup>237</sup> Giurca A. and Jonsson R, 2015. The opinions of some stakeholders on the European Union Timber Regulation (EUTR): an analysis of secondary sources. iForest (early view): e1-e6 [online 2015-03-19] URL: <http://www.sisef.it/iforest/contents/?id=ifor1271-008> (Accessed 12 June 2015)

<sup>238</sup> Giurca and Jonssonl (above 237, 2)

<sup>239</sup>EU (above n235)



**Figure 2: The FLEGT Action Plan and its two instruments and main features (Source: Giurca A, Jonsson R, 2015).**

#### **4.1.3 Regulation: Council FLEGT Regulation (2005)**

This Regulation lays the foundation for the establishment of a FLEGT licensing scheme for imports of timber into the European Community.<sup>240</sup> The Regulation is structured as follows: Chapter 1: Subject Matter and Definitions, Article 1- 2. Chapter 2: FLEGT Licencing Schemes, Article 3-8. Chapter 3: General provisions, Article 9-12. Annex I: Partner countries and their designated licensing authorities. Annex II: Timber products to which the FLEGT licensing scheme applies irrespective of the partner country. Annex III: Timber products to which the FLEGT licensing scheme applies only in relation to the corresponding partner countries.<sup>241</sup> The content and structure of the Regulation befits the requirements of GFG as depicted by appropriate legal rules based on rule of law and enforceable laws.<sup>242</sup> Consequently, this is a sign of a great potential for effective implementation. This Regulation negotiated and enabled FLEGT VPAs.

#### **4.1.4 Implementation Regulation: Commission FLEGT Regulation (2008)**

This Regulation lays down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the

<sup>240</sup> EU. (above n235,1).

<sup>241</sup> EU. 2005 (above n235)

<sup>242</sup> Maguire (above n22, 272)

European Community.<sup>243</sup> The Regulation is structured as follows: Chapter I: Subject-Matter and Definitions, Article 1-2. Chapter II: Requirements Relating to FLEGT Licences, Article 3-5. Chapter III: Acceptance and Verification, Article 6-13. Chapter IV: Electronic Systems, Article 14-15. Chapter V: Data Protection, Article 16. Chapter VI: Final Provisions, Article 17. Annex: FLEGT Licence Format.<sup>244</sup> Based on its structure and content this Regulation conforms to the consistency (with other regional international agreements), comprehensiveness (has an element of SFM), subsidiarity (highlights significance of forest resources to a wide range of stakeholders) and applicability (encourages public participation) criteria.<sup>245</sup> Therefore, effective and efficient implementation should be expected. This Regulation enables the FLEGT VPAs.

#### **4.1.5 Voluntary Partnerships Agreements (VPAs)**

VPAs are legally binding trade agreements that are enabled by the above EU FLEGT Regulations. Moreover, VPAs are regarded as the central plank for the EU FLEGT Action Plan of 2003.<sup>246</sup> VPAs have four distinct phases, i.e. preparation, negotiation, development and implementation.<sup>247</sup> The two essential pillars of a VPA are the Legality Definition (LD) of Timber and the Timber Legality Assurance System (TLAS). The three requirements of the TLAS include the definition of legally produced timber, an instrument or mechanism for control of supply chain (e.g. wood tracing system or chain of custody), and a means of verifying that requirements of the legality definition and the supply chain have been met.<sup>248</sup> The LD of Timber and the TLAS seek to restructure, reform and strengthen Partner Countries national policies and legislation regarding matters of timber legality and governance.<sup>249</sup> Thus timber products are regarded to be legal only if they comply with the requirements of LD and TLAS. Furthermore, these pillars promote and mandate field inspections decisions on the legality of timber and related products. VPAs and EU cooperation aim to clarify

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<sup>243</sup> EU (above n235, 1)

<sup>244</sup> EU. (above n59).

<sup>245</sup> Husgafvel. (above n41, 52).

<sup>246</sup> Putzel, L., Kelly, A.B., Cerutti, P.O. and Artati, Y. (2015). Formalization as Development in Land and Natural Resource Policy, *Society & Natural Resources: An International Journal*, 28:5, 453-472, DOI: [10.1080/08941920.2015.1014608](https://doi.org/10.1080/08941920.2015.1014608) (Accessed 23 May 2015)

<sup>247</sup> EU (2007b). Briefing Note Number 6: Voluntary Partnership Agreements. FLEGT Briefing Notes (2007 series). Brussels: EC.  
[http://ec.europa.eu/development/policies/9interventionareas/environment/forest/flegt\\_briefing\\_notes\\_en.cfm](http://ec.europa.eu/development/policies/9interventionareas/environment/forest/flegt_briefing_notes_en.cfm).

<sup>248</sup> EU (2007c). EU (2007c). Briefing Note Number 3: A timber legality assurance system. FLEGT Briefing Notes (2007 series). Brussels: EC.  
[http://ec.europa.eu/development/policies/9interventionareas/environment/forest/flegt\\_briefing\\_notes\\_en.cfm](http://ec.europa.eu/development/policies/9interventionareas/environment/forest/flegt_briefing_notes_en.cfm).

<sup>249</sup> EU (2007d). Briefing Note Number 2: What is legal timber?

the legality for the country in negotiation with the EU and how it proves it. Consequently, VPAs are perceived as a contemporary and innovative tool for improving forest governance. To this end VPA negotiations have been concluded with six timber producing countries, of which five are African. These are in chronological order: Ghana, the Republic of Congo, Cameroon, the Central African Republic, Indonesia and Liberia (see Table 2 for status of VPAs). Furthermore, official negotiations are on-going in the Democratic Republic of Congo (DRC), Gabon, Guyana, Honduras, Ivory Coast, Malaysia, Vietnam, Laos and Thailand. Other countries expressing an interest include Bolivia, Cambodia, Colombia, Ecuador, Guatemala, Madagascar, Paraguay, Sierra Leone and Myanmar/Burma.<sup>250</sup> Gabon and Ivory Coast are already at an advance stage of negotiations. .

**Table 2: The brief overview of the status VPAs process in Africa as at June 2015**

<b>Country</b>	<b>Official VPA Status</b>	<b>Comments</b>
Cameroon	Implementation phase since 2011  No FLEGT Licences yet.	Although the VPA process is at implementation stage since 2011, poor transparency remains a concern. In addition to that there is still an outstanding issue of the appointment of an independent monitor. Moreover, the independent audit report on consistency of forest titles concessions is now due.
Central African Republic	Implementation phase since 2012  No FLEGT Licences yet.	There was disruption in the implementation of the VPA. However, following the standstill in VPA implementation after the war, updating of VPA roadmap has resumed in earnest.
Cote d'Ivoire	In negotiation since 2013  No FLEGT Licences yet.	VPA negotiations have been on-going since 2013 as stated. However, the development of the social principles of the VPA legality grid was halted towards late 2014 to give way to the drafting of August 2014 Forest Code implementing Regulations.
Ghana	Implementation phase since 2010  No FLEGT Licences yet.	In September 2014, Ghana's LAS was declared well advanced but not complete enough to deliver FLEGT licences. Therefore, the roll-out of the first FLEGT licenses will be started in the beginning of 2016.
Gabon	In negotiation since 2010  No FLEGT Licences yet.	Good progress has been made in the VPA negotiation process in the past few months. Consequently, testing of LAS has also been initiated after which multi-stakeholder consultations will follow.
Liberia	Implementation phase since 2013	With Ebola crisis now contained, VPA implementation is progressing well. There is

<sup>250</sup> Brack, 2008. Analysis of the European Commission's proposal for a regulation laying down the obligations of operators who place timber and timber products on the market.

	No FLEGT Licences yet.	very strong commitment from local CSO and local communities.
Republic of Congo	Implementation phase since 2013  No FLEGT Licences yet.	Implementation of the VPA has shown promising signs of advancement lately. Ultimately, a final contract on the development of the LAS was signed. Henceforth, an independent auditor was recruited to start work in September 2015.

**Source: Adapted and modified from The Forest Watch Special VPA June 2015 updates ([www.loggingoff.info](http://www.loggingoff.info)).**

#### **4.1.6 The Draft EU Due Diligence Regulation of 2008 (‘Towards an EU Timber Regulation’)**

The EC upon realizing that the VPAs would not cope with the complexities of illegal logging and associated trade decided to formulate, develop and publish a draft Due Diligence Regulation in 2008. The ultimate aim was to establish a robust mechanism, the DDS, to avoid and further preclude the entry of illegally harvested and traded timber and associated products to the EU market.<sup>251</sup> This is a culmination of a series of processes and developments towards an equitable and efficient legal regime that seeks to halt illegal logging since the inception of the FLEGT Action Plan.<sup>252</sup> The Action Plan came to the realization that existing instruments for curbing illegal logging such as the FLEGT Licences as dictated by the FLEGT VPAs by virtue of their nature were not enough to stop the export and import of illegal timber into the EU market. Consequently, the EC made a proposal for a more robust EUTR to support the VPAs and FLEGT Licences. This regulation lays down obligations of operators who place timber and associated products on the market.<sup>253</sup> This draft Due Diligence Regulation was revised and amended and later translated into the EUTR of 2010.

#### **4.1.7 The EU Timber Regulation (2010)**

This is Regulation (EU) No 995/2010 of the European Parliament and of the Council.<sup>254</sup> Its central focus is on a DDS, by which operators must prepare to reject illegally logged timber. The three key elements of the DDS are information, risk assessment and risk mitigation. In addition, the Regulation also applies to timber harvested from European forests. Furthermore, the Regulation classifies those involved in the trade of timber or timber products into two categories, i.e. operators and traders each having its own distinct obligations. Operators are required to put in place a risk management or „DDS“. Traders are required to keep information about their suppliers and

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<sup>251</sup> Brack, (above n250)

<sup>252</sup> Brack, (above n250)

<sup>253</sup> Brack, (above n250)

<sup>254</sup> EU (above n60).



customers so that the timber products can be traced when the need arises.<sup>255</sup> Notably, timber and timber products with a valid FLEGT or CITES licence are considered to meet the requirements and are exempted. Although the FSC and PEFC comply with EUTR endeavours, simply certifying is not enough to meet the obligations of the EUTR.<sup>256</sup> However those two certification schemes are considered in risk assessment when evaluating against EUTR requirements.<sup>257</sup>

#### **4.1.8 The Commission Delegated Regulation (EU) No 363/2012 of 23 (2012)**

This Regulation is one of the two pieces of secondary legislation that support the implementation of the EUTR and it lays down the procedural rules for the recognition and withdrawal of recognition of monitoring organizations. Monitoring organizations are mandated to facilitate compliance by assisting operators in fulfilling the obligations of this Regulation. Monitoring organizations are supposed to develop sound and comprehensive DDS under this Regulation. Consequently operators are granted the right to use the DDS and monitoring organizations ensure appropriate use of the DDS. In accordance with international law the Monitoring organizations should be treated equally in a fair, transparent and independent manner by the Commission.<sup>258</sup> It is imperative to develop and implement best practice and standards for monitoring organizations in order to enable them to attain the highest level of expertise with the appropriate capacity to determine the compliance of timber and related products with relevant local and national policies and legislation of timber producing countries. Subsequently, well equipped monitoring organizations would recommend procedures to avert the risk of illegal timber and related products on the market. In cases where the risk of illicitly harvested and/or processed timber and related products is perceived to be significant, monitoring organizations must recommend precautionary measures in order to effectively minimize the risk.<sup>259</sup>

#### **4.1.9 The Commission Implementing Regulation (EU) No. 607/2012 (2012)**

This is the second piece of secondary legislation that supports the EUTR by making provisions concerning the DDS and the frequency and nature of the checks on monitoring organizations.<sup>260</sup> The ultimate purpose of this Regulation is to ensure that there is uniform implementation of the EUTR. On that note, Regulation (EU) No 995/2010 binds operators to adhere to the DDS to avert the risk of trading unlawfully harvested timber and related products on the EU market.<sup>261</sup> It is

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<sup>255</sup> EU. (above n60).

<sup>256</sup> Giurca and Jonssonl (above 237, 2)

<sup>257</sup> Giurca and Jonssonl (above 237, 2)

<sup>258</sup> EU. (above n61)

<sup>259</sup> EU. (above n61)

<sup>260</sup> EU. (above n62)

<sup>261</sup> EU. (above n62)

important to ascertain circumstances under which it is compelling to have a full description of the trees species along with the full botanical or scientific name, the origins, herein referred to as sub-national region from which the wood was harvested and the full details of the concession of harvest. Under this regulation it is imperative to stipulate the nature, extent and frequency of checks that the competent authorities must subject monitoring organizations to.<sup>262</sup>

#### **4.1.10 Shifts in exports to sensitive markets vs. non-sensitive markets**

Between 2000 and 2013 there have been shifts in trade of timber. Less timber is exported to sensitive markets (e.g. EU markets) and more timber is exported to non-sensitive markets, i.e. importers from emerging economies (e.g. China). These trends in trade imply that EU markets have become less important to all timber producing countries with respect to direct trade. To illustrate this, for example in Ghana direct exports to sensitive markets has decreased from 75% to 24%. Similarly exports to other African countries increased from 10% to 30%, meanwhile exports to China increased from 1% to 20%. Likewise, Cameroon's timber exports to EU markets decreased from 70% to 40%. Equally, Cameroon's exports to China increased from 6% to 33%.<sup>263</sup> It can be concluded that the EUTR is beginning to be effective immediately.

#### **4.2 Critique of EU FLEGT Scheme against the Theoretical framework for SFM and good forest governance**

This section provides an evaluation of the EU FLEGT Scheme against the theoretical framework distilled in Chapter 3. Firstly the EU FLEGT Scheme is evaluated against a set of 12 specific substantive legal issues/themes. The Scheme is then assessed against the three broad cross-cutting themes.

##### **4.2.1 The specific substantive legal issues/themes**

###### *1. Security and clarity on land tenure, access, ownership and use rights*

The Action Plan recognizes that disputed land ownership is likely to derail progress towards FLEGT, GFG and SFM. Under the EU FLEGT Scheme, the mechanisms and tools for achieving land reforms that would enable good forest governance are enshrined in VPAs.<sup>264</sup> The 2005

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<sup>262</sup> EU. (above n62)

<sup>263</sup> Hoare, A. Chatham House Report. Tracking illegal logging and related trade. 2015: 18. What progress and what next? Available: [www.chathamhouse.org](http://www.chathamhouse.org) (Accessed 09 September 2015)

<sup>264</sup> Specifically, all VPAs establish a Legality Assurance System (LAS) and/or Timber Legality Assurance System (TLAS) to ensure legality of timber products. The LAS is covered in detail in the Annex of each VPA. LAS or TLAS include allocation of forest use rights and laws regulating harvesting, transportation, processing and selling of timber. Issues of land tenure and ownership are included in some countries. The VPAs of the Central African Republic, Ghana

principles for FLEGT partnership agreements suggested that land tenure and use rights be a key part of responsible forest management.<sup>265</sup> This is infused in all VPAs of Partner Countries thus far. Recently, it was reported that one of the breakthroughs in VPAs implementation is the initiation of policy and legislative reforms.<sup>266</sup> By virtue of the interdependence of forest policies and laws on land tenure, access, ownership and use rights, the Action Plan has triggered reforms on land-related policies has commenced in all Partner Countries.<sup>267</sup> This is a major breakthrough considering that the landmark NLBI was unsuccessful in resolving the critical issues surrounding land tenure. Consequently, in Cameroon legal tenure or right of use of land and other resources that may be affected by timber harvesting rights have been included in the text of the VPA. There is recognition of customary tenure in new laws in the CAR's VPA. In Liberia the VPA include respect and recognition of rights of other parties to legal tenure or rights of use of land or resources. In Ghana VPA mention respect of cultural norms and rights of other uses. Thus the legality grid makes explicit mention of recognition of customary rights, and this empowers traditional institutions and/or local authorities. Moreover, VPAs can be customized thus giving room for discussion and resolution of critical issues such as land tenure rights. In reality, it has been reported that VPAs have not been able to push for land code reforms which legally recognize customary land tenure regimes.<sup>268</sup>

## ***2. Stability of institutional structures***

On one hand, stability of institutions can be enhanced by adequate physical, human and financial capacities. On the other hand, it is clearly known that the forest sector in African timber producing countries is led by under-funded public forest administrations. Thus PFAs lack the appropriate

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and Liberia are explicit on recognition and respect of legal tenure or rights of use of land. On the other hand, the lack of coverage of land tenure and ownership issues in certain countries jeopardizes the whole FLEGT process as these are integral to its success. EU (above n247)

<sup>265</sup> Greenpeace, FERN, WWF, (2005). Principles for FLEGT partnership agreements Available at <http://bit.ly/WmD0H5WWF> (Accessed 28 November 2014)

<sup>266</sup> FERN (above n19, 11-21)

<sup>267</sup> FERN (above n19, 11-21)

<sup>268</sup> Therefore VPAs are unable to address land conflicts arising from competing land uses. Most VPA countries consider the economic importance of forest sector as much smaller than that of agriculture and mining. Thus VPAs are unable to reform wider land use planning policies and laws. For example, in Ghana, Cameroon, Central African Republic and the Republic of Congo all land and forests are state-owned, but communities have access and use rights. While communities in Liberia can own forestland including the trees, in Ghana forest lands are owned by private landowners and the State oversees their management on behalf of the landowners. Landowners only own trees on forest lands if and only if they planted them. Clear ownership and use rights are fundamental to the principles of the rule of law, hence adherence and respect of rule of law. Thus the GFG is promoted and SFM supported at local and national levels.

physical infrastructure and human capacity to deliver on their mandate. Furthermore, the private sector in African Partner Countries lacks capacity to adopt and implement international forest standards and to comply with national forest laws.<sup>269</sup> In response to this situation, the EU FLEGT Scheme through the EU FLEGT Action Plan makes special provisions for measures to support timber producing countries and to support private sector initiatives through VPAs and the EUTR.<sup>270</sup> Accordingly, VPAs support include capacity building for the public sector, and training and technical assistance to governance institutions, local communities and civil society organizations to enhance implementation of the emerging legal regimes.<sup>271</sup> Subsequently, VPAs support the empowerment of local communities which could enable them to practise community forestry and be able to participate in prevention of illegal logging at community-level. On the other hand, the EU FLEGT Action Plan supports the public sector in adopting best practice in supply chain management.<sup>272</sup> Furthermore, the private sector is enabled to adhere to high forest management standards and legal compliance. Over and above that, the Action Plan promotes adherence to international social safeguards and corporate social responsibility standards in the private sector.<sup>273</sup> Overall, the EU FLEGT Scheme aims to strengthen institutions dealing with forestry to enable them to cope with the complexities of FLEGT, GFG and SFM<sup>274</sup>.

### *3. Clear environmental and forestry standards*

The appropriate legal regime for regulation of SFM should support the development and implementation of high environmental and forestry standards which embrace the principles of sustainable development. In response to this, the EU FLEGT Scheme uses VPAs to support PFAs in their review and updating of national forest policies and legislation towards enhanced forest governance and development and implementation of high standards for SFM.<sup>275</sup> In addition, the EU FLEGT Scheme supports private sector initiatives, i.e. to empower timber producing countries to be

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<sup>269</sup> Maguire (above n22)

<sup>270</sup> EU (above n56), EUTR (Article 13)

<sup>271</sup> EU (above n247).

<sup>272</sup> EU (above n60)

<sup>273</sup> EU (above n60)

<sup>274</sup> Specifically, capable institutions are being established in each Partner Country to verify timber legality and to issue FLEGT licences according to the specifications in the LAS or TLAS. These are government departments or agencies responsible to government. While the establishment of institutions is vital it is important to set a benchmark for uniformity in their quality and structure for ease of uniform implementation of the FLEGT Action Plan. Stable institutions are crucial in developing high forest and environment standards for enhanced compliance and enforcement. These institutions should establish sound procedures and approval processes for trade in forest products. Appropriate institutional frameworks are key to GFG, SFM.

<sup>275</sup> EU (above n247)

able to adhere to high standards of forest management and legal compliance, and adoption of corporate social responsibility.<sup>276</sup> The Action Plan is not very explicit or even prescriptive on the nature of SFM standards. Despite the existence of the EUTR, forest standards remain the prerogative of the Member States or timber producing countries. The EU FLEGT Scheme does not have an instrument prescribing environment and forestry standards. However, the EUTR does not recognize the SFM standards prescribed by voluntary programmes.<sup>277</sup> Minimum standards are crucial to provide social and environmental safeguards. Clear equitable environmental and forestry standards support compliance and enforcement, as the livelihood of local communities is protected from FLEGT. This lays a firm foundation for SFM.

#### *4. Effective and equitable approval processes*

The VPA process and the EUTR's DDS may be time consuming, but are proven to be participatory and transparent enough to avoid any short cuts that could result in illegal timber finding its way into the EU markets.<sup>278</sup> The planning and implementation process for VPAs normally entails lengthy multi-stakeholder engagements and a time-bound action plan. This roadmap sets out an implementation schedule and time frame for priority actions for improving forest governance and implementing the FLEGT licencing scheme. Consequently, there is a time lapse between enforcement of the VPA and the operationalization of the licensing scheme. This is mainly due to dynamics surrounding the Legality Assurance System. Thus, once a Partner Country deems its Legality Assurance System compliant with all the technical VPA requirements it will advise the EU, through the Joint Implementation Committee.<sup>279</sup> Thereafter, the European Commission will endorse the Partner Country, and subsequently all timber products listed in the licensing scheme, to the Appendices of the EUTR. Finally all applicable timber products exported from the Partner Country to the EU markets shall require a FLEGT licence.<sup>280</sup> Furthermore, the VPA process seems to be difficult and long as confirmed by the fact that there is not a single FLEGT licence to date from African timber producing countries. The process involves PFAs, and ratification by national

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<sup>276</sup> Giurca and Jonssonl (above 237, 2)

<sup>277</sup> SFM standards set out by the FSC and PEFC are not recognized. As a result FSC or PEFC certified timber cannot be accepted under this regulation. Consequently, a FSC or PEFC certificate is not considered proof of legality under the EUTR. Only timber coming of the DDS, FLEGT licence or CITES certified is acceptable. This is despite the fact that the SFM standards of the FSC and PEFC are based on the internationally agreed elements of the SFM framework that forms C&I for SFM. Notably, the EUTR has influenced the FSC and PEFC to align their processes to the DDS of the EUTR. As a result, in the near future there shall be voluntary programmes with a robust DDS to build on their already tried and tested comprehensive SFM standards.

<sup>278</sup> EU (above n247)

<sup>279</sup> EU (above n247)

<sup>280</sup> EU (above n247)

parliaments. So far the VPAs processes have taken between 18 months to 5 years.<sup>281</sup> The absence of FLEGT licences thus far might reflect badly on the VPA model and processes. However, this is a true reflection of the challenges of uprooting corruption, lack of compliance and poor law enforcement which makes it impossible to produce timber in a manner that is legally, socially, economically and environmentally sound. In this regard FERN has reported that the VPAs have been a very successful instrument amongst emerging forest regimes (see Table 3).<sup>282</sup> This is manifested by the very good relations that have been established between government, NGOs and the private sector during the course of the preparation, negotiation, development and implementation phases of the VPAs.<sup>283</sup> On another note, the various steps in the DDS of the EUTR could also take up an enormous amount of time considering the information in the first step in the DDS. This includes information about the legality of the timber based on compliance with national forest legislation, which is a massive step in FLEGT.<sup>284</sup> While the subsequent steps of risk assessment and risk mitigation are more or less straight forward. With the robustness coupled with the complex processes of the EUTR there is a strong likelihood that timber producing countries are now exporting timber to alternative markets away from the EU.<sup>285</sup> As a result tropical timber is being replaced by temperate timber in the EU markets.<sup>286</sup>

**Table 3: Top Success VPAs stories across the world with two Africa countries**

Country	Case study notes
<b>1. Guyana</b>	Local communities and the Public Forest Administration have made significant advances towards dialogue and open engagements regarding issues of forest law enforcement, governance and trade. Subsequently, this improved participation is expected to translate to improved forest governance, compliance and law enforcement, including marked reduction in illegal logging and associated trade in the country.
<b>2. Honduras</b>	The involvement and participation of CSOs in VPA negotiations has resulted in improvements in the rights of local communities adjacent to natural forests and woodlands. These include rights of forest dependent communities with regard to tenure and rights to sustainable livelihoods.
<b>3. Central African Republic</b>	The participation of all stakeholders in VPA negotiations and more particularly CSOs has strongly influenced the Draft National Constitution. This has made it possible to integrate the national, regional and international policies and legislation in the Constitution. For example, the International Labour Organisation (ILO) Convention on Indigenous Peoples' Rights, the right to environmental information and justice, and improved natural resource sector transparency have been included

<sup>281</sup> The Forest Watch Special VPA June 2015 updates ([www.loggingoff.info](http://www.loggingoff.info)). (Accessed 20 June 2015)

<sup>282</sup> FERN (above n18, 38)

<sup>283</sup> FERN (above n18, 38)

<sup>284</sup> EUTR (Article 4 (2))

<sup>285</sup> EUTR (Article 4 (2))

<sup>286</sup> Giurca et al (above n52)

	in the Draft National Constitution of the Central African Republic. Notwithstanding the recent coup and subsequent political turmoil, this provides the most ideal opportunity for CSO-led governance reforms in the country.
<b>4. Ghana</b>	The negotiations and implementation of VPA in the country has enabled CSOs to successfully motivate for taxes to be increased for the first time in ten years (in 2014). Most importantly, a portion of these taxes are due to local communities, hence greater revenues are expected for communities. This is likely to transform livelihoods.
<b>5. Liberia</b>	Similar to the case of Ghana, the VPA processes in Liberia have led to the 2014/2015 national government budget to include US\$1 million for local communities. This budget allocation is a partial payment of a total of US\$ 1.4 million owed by the government to the local communities which has been successfully claimed through the VPA process. However, the payment still pending. In addition, the VPA process has influenced policy and legal reforms. For example, the text of the Draft Land Rights Act will give recognition to the customary land rights of local communities. This implies that local communities can now demand a proper income if they decide to lease land to industrial companies such as timber companies, mining companies or others.
<b>6. Vietnam</b>	In the case of Vietnam the VPA legality assurance system includes a definition of tenure and associated rights which is more considerate to local communities, and is in keeping with the recommendations of CSOs on issues of tenure and rights.
<b>7. Indonesia</b>	The CSOs have used the probity, transparency, accountability and monitoring requirements of the VPA to make public declaration of information about logging concessions mandatory. This has aided easy access to information from the government forestry department which is perceived to be one of the most corrupt sectors in Indonesia. Enhanced transparency will promote probity and accountability and ultimately good forest governance at local and national levels.

Source: Adapted modified from The Forest Watch Special VPA June 2015 updates ([www.loggingoff.info](http://www.loggingoff.info)).

#### 5. *Transparency, accountability, and public participation*

As an integral part of the EU FLEGT Action Plan VPAs are commitments to ensure transparency, probity and accountability in forest governance. Furthermore, VPAs serve as a mechanism for facilitating multi-stakeholder involvement and participation in the design, development and implementation phases.<sup>287</sup> One of the key principles on which VPAs are founded ensures that all VPAs are based on participatory review of all forest-related policies and legislation. In addition, VPAs encourage the involvement and full participation of the private sector in FLEGT processes. This is in view of the critical and significant role that the private sector plays in timber production and trade, and its role in influencing illegal logging. Through VPAs there is transparency in the allocation of concessions, permits and forest user rights. Ultimately corruption is likely to be effectively curbed. The DDS of the EUTR is aligned to the principles of international law, and transparency, accountability and stakeholder participation are engraved in the regulation. The

<sup>287</sup> EU (above n247)

elements of a VPA include that it stipulates that the legal framework spells out the need for free, prior and informed consent or need for consultation with local communities in allocation of concessions.<sup>288</sup> Furthermore, the legality grid spells out need for mapping concession area and/or joint management with local communities. Another aspect of transparency could be in the form of Independent Forest Monitoring (IFM).<sup>289</sup>

Regarding transparency, accountability and participation in the VPA text, in Ghana, Liberia and the Republic of Congo for example, VPAs include clauses on Free, Prior and Informed Consent (FPIC) of communities, while in the Central African Republic local communities are only informed after receipt of provisional signature for concession. On the other hand in Cameroon, there is no mention of information sharing or community consultation regarding allocation of concessions.<sup>290</sup> Transparency, accountability and stakeholder participation uproots corruption and greatly improves compliance and enforcement. Thus improving governance and supporting SFM.

#### *6. Cooperation and coordination procedures*

Under the EU FLEGT Scheme, when a VPA comes into force its intended outcomes are realized through cooperation between the representatives of the Partner Country, the European Commission and Member States.<sup>291</sup> These representatives form the Joint Implementation Committee (JIC) that facilitates, monitors and supervises the effective implementation of the VPA between the EU and the Partner Country.<sup>292</sup> VPAs between timber producing countries and the EU have so far laid a firm foundation for best practice that has culminated in numerous novel models for trade negotiations that have inspired good forest governance.<sup>293</sup> The improved forest governance is key to the survival of forests on the planet, and provision of social safeguards to forest-dependent local communities and indigenous people. VPAs have stimulated successful cooperation and coordination within stakeholders at national level (i.e. government, NGOs and the private sector

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<sup>288</sup> FERN (above n19, 11-21)

<sup>289</sup> Specifically, IFM works exceptionally well in cases where it has a broad mandate of monitoring issues of law enforcement, transparency and governance. A Question has been raised? And Answered: For an effective FLEGT programme IFM or Monitoring per se must not be tied only to the VPA, but be based on adherence to the national policies and compliance with national legislation and the principles of sustainable development. Monitoring should ensure that forest allocation and management are not riddled with corruption and lack of political will. A strong and robust IFM system can hugely enhance transparency and accountability. IFM improves credibility in the forest sector by independently identifying system failures and through increased transparency. There are observed inconsistencies between VPAs texts in their official recognition of civil society independent monitors. Brack, D. and Léger, C. Exploring credibility gaps in Voluntary Partnership Agreements: A review of independent monitoring initiatives and lessons to learn. 2013: 1-47.

<sup>290</sup> FERN (above n19, 11-21)

<sup>291</sup> EU (above n247)

<sup>292</sup> EU (above n247)

<sup>293</sup> FERN (above n19, 11-21)



have converged on FLEGT, GFG and SFM issues), as well as between various participating countries, and this is a model of excellence in the forestry sector.<sup>294</sup> Article 12 of the EUTR makes provisions for cooperation between competent authorities. The EU further advances the implementation of the EU FLEGT Action Plan through existing regional FLEG processes coordinated by the World Bank.<sup>295</sup> Where there is a need, funding for cooperation is made available through available Cooperation instruments. In addition, the cooperation process is strengthened through collaboration with EU Member States development cooperation programmes. Precisely, the EU FLEGT Action Plan promotes cooperation between governments.<sup>296</sup> National, regional and international cooperation and coordination creates a favourable environment for effective monitoring and reporting. This further enhances compliance and enforcement leading to improved governance laying a foundation for SFM.

### *7. Monitoring and evaluation and reporting*

The EU FLEGT Scheme lays down a clear logical framework for monitoring and evaluation of the VPAs and EUTR through various instruments. There are three levels of monitoring to ensure efficient and effective implementation of VPAs, i.e. JICs, independent auditors and independent monitors. In some VPAs IFM by civil society is mentioned. Relevant clauses to monitoring are contained in Article 2(14), Article 5(3), and Article 6(2) of the *Regulation: Council FLEGT Regulation* (2005). Subsequently, this regulation is implemented *Implementation Regulation: Commission FLEGT Regulation* (2008). Eventually, Article 8 of the EUTR (2010) followed by the Commission Delegated Regulation (EU) No 363/2012 of 23 (2012) and the Commission Implementing Regulation (EU) No. 607/2012 (2012). One of the key principles on which VPAs are founded requires that they include independent verification and procedures. Under the VPAs, the JIC is responsible for the development, implementation and monitoring and evaluation of the VPAs between the Partner Countries and the EU. Date of effect of the FLEGT licence is a prerogative of the JIC that is informed by progress in the VPA processes and readiness of partner Countries. The monitoring and review process includes review of VPA implementation and review of reports of Independent Monitoring Organizations. At the national level all Partner Countries are required to

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<sup>294</sup> FERN (above n19, 11-21)

<sup>295</sup> World Bank (above n79)

<sup>296</sup> Legally-binding bilateral partnership agreements are the cornerstone of the EU FLEGT Scheme. In Africa, as mentioned earlier, Ghana, Cameroon, the Central African Republic and the Republic of Congo all have VPAs with the EU. Commentators' views: Strengthening cooperation is vital for any meaningful progress to be realized in curbing illegal logging. Reports on status of VPAs indicate that there is marked improvement in cooperation between various forest sector stakeholders. This is mainly attributed to the EU FLEGT Scheme.

undertake annual reviews and reporting on the status of the implementation of VPAs.<sup>297</sup> Annual reports provide regular updates on progress towards achieving the objectives and outcomes as highlighted in the VPA implementation schedule and time frame. Core to this assessment are the impacts of VPAs on illegal logging and associated trade in both EU and local markets<sup>298</sup>. Further, the monitoring and review process inspires the reconciliation of the VPAs and FLEGT licences, making sure all conflicts are resolved.<sup>299</sup> In 2014 the EU initiated a participatory review of the various components of the EU FLEGT Action Plan (including VPAs) and subsequently a review of the EUTR in 2015. The outcome of these reviews will inform the future direction of the EU FLEGT Scheme. This reflects the degree of transparency in the monitoring process. It is important that the reviews, and the EU's response, completely show the great potential of VPAs in galvanizing long-term improvements in FLEGT, GFG and SFM. Currently only Ghana, Cameroon and the Central African Republic have fully operational JICs, while Liberia has a pre-JIC structure. In the Republic of Congo the JIC members have been identified but the JIC is not yet in place. In most VPA countries, the JIC is complemented by informal committees that include government, the private sector and civil society. Nonetheless, some flaws have been reported in the monitoring systems in certain Partner Countries.<sup>300</sup> Utilization of monitoring reports is crucial in informing future planning for improved implementation efficiency. This keeps improving forest governance and enhances the feasibility of SFM.

#### 8. *Effective compliance and enforcement*

Firstly, with the EU FLEGT Scheme, the starting point for the road to effective compliance is the EU FLEGT Action Plan which serves as the road map. Secondly, for ease of improved compliance

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<sup>297</sup> EU (above n247)

<sup>298</sup> EU (above n247)

<sup>299</sup> EU (above n246)

<sup>300</sup> It is reported that under the VPA independent auditors are unable to monitor performance of government law enforcement officers, compliance of industry and government with social agreements and distribution and utilization of decentralized forest revenues. In addition, the independent auditor cannot monitor publication of information and progress on policy and law reform processes. However, IFM is an additional component that checks if national forest policy objectives and legislation are adhered to in real terms. For example, in the Democratic Republic of Congo (where VPA negotiations are underway) IFM uncovered lack of enforcement in 60% of forest concessions and consequently illegal activities went unnoticed and revenue was lost. However, IFM has suffered from chronic shortage of sustainable financing mechanisms. Often political will is essential for effectiveness of IFM. There is a gap in the monitoring system under VPAs that needs a relook, as transparency, accountability and public participation may be hampered. Strengthening of monitoring systems to provide an enabling environment for IFM is imperative. There are suggestions for the mention of social and economic impacts assessments, EIAs and civil society impact monitoring in the VPA text could translate VPAs into a robust instrument. This can lead to its impacts on forests, communities and forest governance becoming measurable. Brack, D. and Léger, C. Exploring credibility gaps in Voluntary Partnership Agreements: A review of independent monitoring initiatives and lessons to learn. 2013: 1-47.

and enforcement, this Action Plan culminated in two instruments, i.e. the VPAs and the EUTR. The intended outcomes of the VPAs provide for an open dialogue amongst all forest stakeholders towards national-level policy and legislative reforms. Subsequently, reforms bring the national policy and legislative frameworks to a level where timber producing countries are able to implement the EUTR. During the preparation, negotiation, development and implementation phases of the VPAs the various pieces of regulations that constitute the EU FLEGT Scheme are discussed with forestry stakeholders.<sup>301</sup> The Action Plan recognizes that improvement of forest governance is a precondition for effective compliance and makes enforcement feasible. Article 12 of the EUTR provides for Cooperation and Article 13 seeks to enhance compliance through technical assistance, guidance and exchange of information.<sup>302</sup> However, Ramcilovic-Suominen argued that law compliance to the EU FLEGT Scheme in Africa may be subject to the theories of compliance that are based on two perspectives, the instrumental and normative.<sup>303</sup> The instrumental perspective assumes that people are rational and tend to obey laws based on cost and benefit of compliance and non-compliance.<sup>304</sup> People compare the expected illegal gain and the expected fear and extent of sanction. While the normative perspective being that people obey laws based on norms and values, which are rules that prescribe desirable behavior and forbid undesirable behavior<sup>305</sup>. With the EU FLEGT VPAs known to have no clear incentives or gains, therefore compliance with listed legislation in the VPAs might be very difficult in the African context.<sup>306</sup> The EU FLEGT Plan further calls for the use of existing legislation or adoption of new legislation to support the implementation of this Plan. For example, application of criminal legislation and other legal instruments such as the the OECD Convention on Bribery and Corruption is also related to illicit timber harvesting and related trade as these are tantamount to bribery and corruption in some circumstances.<sup>307</sup> Further, to enable effective implementation of the Action Plan, all EU Member States and candidate countries are affiliated to CITES, and as earlier mentioned, CITES is implemented through Council Regulation (EC) No 338/97 of 9 December 1996 and Commission Regulation (EC) No 1808/2001 of 30 August 2001.<sup>308</sup> Most importantly, CITES has developed

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<sup>301</sup> FERN (above n19). Further these regulations make all relevant provisions and lay down procedures for FLEGT that Partner Countries are obligated to adhere to once VPAs are in place. Compliance and enforcement should be greatly improved by the linking of national policies and legislation to the EUTR through VPAs, which are the backbone of the EU FLEGT Action Plan. Thus mandatory licencing of all exports to all destinations, under the VPAs, ensures compliance.

<sup>302</sup> EUTR (Article 12, Article 13)

<sup>303</sup> Ramcilovic-Suominen (above n65)

<sup>304</sup> Ramcilovic-Suominen (above n65)

<sup>305</sup> Ramcilovic-Suominen (above n65)

<sup>306</sup> Ramcilovic-Suominen (above n65)

<sup>307</sup> EU. (above n60)

<sup>308</sup> Wijnstekers (above n27)

tools to safeguard that trade in listed species is both legal and sustainable.<sup>309</sup> Moreover the EU realizes that CITES is not just an ordinary international conservation agreement but a trade instrument that reconciles economic sustainability and ecological sustainability.<sup>310</sup> Currently, the EU FLEGT Action is conducting investigations to ascertain if other existing EU and/or Member State policies and legislation can be used to curb illegal logging and associated trade.<sup>311</sup> Issues under consideration include: applicability of the money laundering legislation, CITES and possibilities of additional timber species in its appendices, the applicability of the OECD Convention, the applicability of legislation on stolen goods, and the development and implementation of new legislation to cover trade in illegal timber that is not covered by VPAs.<sup>312</sup>

Subsequently, to guide and promote compliance and improve enforcement the various articles of the EUTR are vital.<sup>313</sup> Enabling national policies and legislation and sound institutional arrangements are key to the implementation of the EU FLEGT Action Plan, especially the two instruments, i.e. VPAs and the EUTR. Continued effort to strengthen institutions and reform policies and legislation is highly necessary. All the other legal themes discussed are solely a foundation leading to effective compliance and enforcement that in turn leads to GFG and SFM. The efficiency of the EU FLEGT Scheme is further enhanced by the fact that where VPAs are not signed the DDS guarantee timber legality.<sup>314</sup>

#### *9. Financial incentives and economic instruments for sustainable use*

The FLEGT Scheme has no clear framework for financial incentives for sustainable resource from FLEGT, GFG and SFM. Though, the EU provides support to an international network of FLEGT-related technical assistance to ensure effective and efficient implementation of the FLEGT Action Plan and its associated VPAs and hierarchy of Council and Commission Regulations. An important role player in this global network is the EU-FAO FLEGT Programme. This programme is responsible for grant funding to enable and support timber producing countries to negotiate and then implement a programme portfolio of projects that address crucial aspects of the EU FLEGT

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<sup>309</sup> Wijnstekers (above n27)

<sup>310</sup> Wijnstekers (above n27)

<sup>311</sup> EU (above n60)

<sup>312</sup> EU (above n60)

<sup>313</sup> Relevant articles include: Article 3 Status of timber and timber products covered by FLEGT and CITES, Article 4 Obligations of operators, Article 5 Obligations of traceability, Article 6 Due Diligence Systems, Article 7 Competent Authorities, Article 8 Monitoring organizations, Article 10 Checks on operators, Article 11 Records of checks, Article 12 Cooperation, and Article 13 Technical assistance, guidance and exchange of information. (EUTR, above n60).

<sup>314</sup> There are two sets of legality, i.e. the VPAs and DD, this is why DD regulation was adopted in 2008 after the VPAs one in 2005. Montouroy. The EU FLEGT Action Plan to Counter Illegal Logging: Recentralization of European Rule Making, International Cooperation and Privatized Global Forest Governance. 2013: 1-23.

Action Plan.<sup>315</sup> This underscores the EU FLEGT Scheme's focus and ambitions to incentivise national programmes implementing FLEGT, GFG, and SFM principles, criteria, indicators and standards. However, institutions in the EU Member States continue to struggle with the implementation of the EUTR mainly regarding interpretations of requirements, prosecutions, penalties and fines, and the role of third party evidence/verification systems. This could be partly due to that local communities are poor and have socio-economic needs and priorities that may only be addressed through financial or economic incentives.

#### *10. Equitable sharing of forest benefits amongst stakeholders*

The primary role of the EU FLEGT Scheme is to curb illegal logging and advance GFG and SFM. In the process of achieving its ultimate purpose, national forest policies and legislation framework, in Partner Countries, is reformed. All forest-related laws listed in the VPA are aligned and implemented or enforced accordingly and in line with the rule of law requirements.<sup>316</sup> Thus the VPAs process supports multi-stakeholder participation in policy and legislation reform processes and inclusivity in decision making. Ultimately one of the indirect consequences of improved forest governance is equitable sharing of benefits amongst all stakeholders. The reported improvement of forest governance in all Partner Countries implies that government, NGOs and the private sector are engaging and benefits accruing from forests will soon be allocated to all stakeholders in a fair, just and equitable manner. Moreover, equitable benefit sharing is enhanced by GFG (which is inspired by transparency, probity, accountability and multi-stakeholder participation). The text of the VPAs includes a clause that states that the legality grid refers to social contracts or project or benefit sharing (money).<sup>317</sup> The VPAs resonates with GFG.<sup>318</sup> Thus VPAs must be seen to be making remarkable and credible contribution to governance reforms, especially on access, use and benefit sharing. For example, the Republic of Congo has established a Local Development Fund, while Liberia has set up a Community Benefit Sharing Trust. Recognition and respect of the rights of indigenous peoples and local communities is integral to FLEGT, GFG and SFM.

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<sup>315</sup> For further reading see: EU FAO FLEGT Programme, <http://www.fao.org/forestry/eu-flegt/> (Accessed 20 February 2015)

<sup>316</sup> Maguire. (above n22, 272)

<sup>317</sup> FERN (above n18, 11-21)

<sup>318</sup> The VPAs suggest that the forest on community land belongs to the community. In addition, communities on concession areas have the right to benefit from forest resources. Furthermore, logging companies have to pay stumpage and land rent to communities. Lastly, the community decides on the development projects to be implemented with the money. For example, in the Republic of Congo the VPA includes substantive focus on social benefits within the context of law reforms. Whereas in Cameroon and Central African Republic VPAs specify the need for a mandatory socio-economic study before commencement of concession allocation. FERN (above n18, 11-21)

### *11. Equitable conflict resolution procedures*

The EU FLEGT Scheme makes provisions for the establishment of the JIC for the VPAs. Therefore, the JIC under the VPAs is the mechanism responsible for the facilitation, monitoring and supervision of the implementation of VPAs, including conflict resolution.<sup>319</sup> Basically, the role of the JIC is mediating and resolution of any conflicts and disputes related to VPAs and FLEGT licencing schemes.<sup>320</sup> Further, the JIC is responsible for dealing with complaints about the performance of independent auditors. For ease of effectiveness and efficiency the JIC comprises members of the tripartite, i.e. Partner Countries, the European Commission and Member States. In VPAs the legality grid includes conflict resolution or complaint mechanism (as part of IA, JIC, LAS, etc.). In addition, the legality grid spells out compensation for damaged property.<sup>321</sup> The JIC plays a critical role, and must be empowered to deal with the complexities in the VPA processes. Disputes and conflicts can halt progress in FLEGT, and subsequently hamper efforts towards GFG and SFM. Hence equitable mechanisms for resolving disputes and conflicts are paramount for effective implementation of VPAs. Innovation: To prevent disputes and conflicts between communities and timber companies, Ghana, the Central African Republic, Liberia and the Republic of Congo have adopted social obligations (which are guided by national laws). These include compensation for communities, negotiated social contracts between companies and communities, equitable access and benefit sharing, and dispute resolution mechanisms.<sup>322</sup>

### *12. Mixture of regulatory approaches (direct regulation and voluntary mechanisms)*

The EU FLEGT Scheme is based on a set of regulatory tools, enforcement tools and criminal tools under the EUTR, as well as the VPA model as a voluntary mechanism. Moreover, once signed, FLEGT VPAs are legally-binding trade agreements, as enabled by *Regulation: Council FLEGT Regulation (2005)*<sup>323</sup> and the *Implementation Regulation: Commission FLEGT Regulation (2008)*.<sup>324</sup> The principles for FLEGT Partnership Agreements are categorized into key principles, forest management and licensing scheme. Each of these categories lays down detailed principles for VPAs. VPAs often embrace legality, transparency, accountability, probity, participation, access to information and data, independent monitoring and reporting, and policy and legislative reforms amongst other issues. Furthermore, human rights and customary law are highly regarded in VPAs.

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<sup>319</sup> EU (above n246)

<sup>320</sup> EU (above n246)

<sup>321</sup> FERN (above n18, 20-26)

<sup>322</sup> FERN (above n18, 11-26)

<sup>323</sup> EU. 2005 (above n57)

<sup>324</sup> EU. (above n58)

But until now, other international voluntary programmes are not yet fully recognized (e.g. the FSC and PEFC), but just appreciated as a step in the right direction. Thus on legality, the EUTR explicitly stipulates that timber and associated products that are covered by FLEGT Licenses or CITES permit meet the requirements of the regulation<sup>325</sup>. Furthermore, the regulation recognizes that certified timber products offer evidence of legitimate timber, but states that certification does not automatically guarantee legality at the level of FLEGT Licenses or CITES.<sup>326</sup> This is despite the fact that forest certification is perceived as a major tool that guarantees that timber products originate from a well-managed forest.<sup>327</sup> Therefore certified timber products are considered low risk within the DDS, but it is yet to be seen if certified products could finally be recognized and have their role in the EUTR defined. As a result in some cases companies that bear an FSC Certificate could acquire compliance with the EUTR easier than to non-certified companies.<sup>328</sup> On one hand, the value of VPAs in creating an enabling environment for the implementation of the EUTR is priceless. These trade agreements do the groundwork, and have guided policy and legislative reforms in Partner Countries. On the other hand, upon the realization that the effect of VPAs in reducing illegal logging was not strong enough the EU developed the EUTR to complement it.

#### 4.2.2 The cross-cutting themes

##### *1. Clear, coherent and consistent law and policy*

Firstly, the EU FLEGT Scheme is based on broad-base consultation and participation as well as international law. Thus the scheme comprises a clear, coherent and consistent legal framework inspired by a set of logical interrelated and interdependent instruments. These instruments complement each other effectively and efficiently.<sup>329</sup> Secondly, legislative and regulatory reforms

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<sup>325</sup> EU (above n60)

<sup>326</sup> EU (above n60)

<sup>327</sup> Trishkin et al. (above n142)

<sup>328</sup> Trishkin et al. (above n142)

<sup>329</sup> The FLEGT Action Plan has produced a set of well linked and connected instruments/regulations. These form a sequence and a hierarchy of interrelated instruments that constitute the EU FLEGT Scheme. These are in keeping with international law and international trade law.

\* The key principles include:

1. “VPAs must include a time-bound action programme.
2. VPAs must be based on participatory review of all forest-related laws (including human rights and customary law) to identify weaknesses and injustice.
3. VPAs must include independent verification and monitoring procedures.
4. Adoption of a VPA must be made conditional on the support of a representative range of non-state actors.
5. All exports must be licensed, not only those to the EU.
6. A VPA should be a component of national forestry programme.
7. A VPA must include time-bound programme of activities and milestones towards sustainable forest management.
8. Existing laws must be reviewed in transparent and participatory processes.

are integral to the EU FLEGT VPAs. Thus the development of a coherent set of national instruments for FLEGT is one of the key focus areas. This can be achieved through identifying relevant forest-related pieces of legislation and listing them in the VPA as per the prescribed principles\* and key elements of VPAs.<sup>330</sup> Subsequently, multi-stakeholder policy and legislation reviews are commissioned to improve coherence and synergies. These instruments are supposed to be consistent with FLEGT related regional agreements and relevant multilateral environmental agreements. Reports on implementation of VPAs have so far indicated positive results on policy and legislative reforms during the negotiations. However, recent developments suggest that Partner Countries are struggling with alignment of national laws listed in the VPAs.<sup>331</sup> The EU FLEGT recognizes that coherent policies and legislation that are aligned to international law are highly likely to promote respect of the rule of law in the forest sector. In addition, consistent policies and laws that are complementary are easily accepted and implemented by stakeholders, thus improving compliance and enforcement.

## 2. *Coherence of legislation and rule of law (respect of rule of law)*

The EU FLEGT Scheme comprises a hierarchy of instruments that adhere to the principles of international law and the requirements of the rule of law. These instruments are in harmony with the premise of the rule of law. But the same cannot be said about the hierarchy of forest-related laws in Partner Countries. Firstly, the role of law in SFM is not established, and secondly,

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9. Legality definition must be based on key principles of responsible forest management.
  10. Mandatory licensing of all exports to all destinations (precondition of the VPA to avoid circumvention of trade).
  11. EU's acceptance of licenses conditional on satisfactory progress with action programme.
  12. Prescribed chain of custody system procedures.
  13. Licenses to be issued by a separate body, removed from the influence of government forestry authority.
  14. Verification by independent body.
  15. Customs to do final paper and physical check. Verification body and customs to count actual shipments.
  16. Civil society needs to have access to data and premises to monitor VPA implementation". FERN (above n18, 11-26)

<sup>330</sup>The key elements of a VPA form a guideline for Partner Countries and include a long list of components that comprise the following: firstly, "products included in VPA, VPA coverage of export and domestic market, legality grid makes explicit mention of recognition of customary rights, legality grid spells out the need for mapping concession areas and/or joint management with local communities, legality grid refers to need to conduct socio-economic studies, legality grid includes mention of Environmental Impact Assessment before logging operations, legality grid spells out compensation for damaged property, legality grid refers to social contracts or project or benefit sharing (money), legality grid includes conflict resolution or complaint mechanism (as part of IA, JIC, LAS, etc.), legal framework spells out the need for free, prior and informed consent or need for consultation with local communities in allocation of concessions, and scope of legal reform spelt out in VPA". Secondly, "legal reform processes seen as priority by NGOs, timing of the reform (before or after issuing FLEGT licences), information access, type of Independent auditor and frequency of audits, independent monitoring is part of VPA/included in the LAS (formal recognition), independent civil society monitoring (informal, external to LAS), and involvement of civil society in the formal structures dealing with the implementation of the VPA". FERN (above n18, 11-26)

<sup>331</sup> FERN (above n19, 11-26)



adherence to the requirements of the rule of law is a major challenge as it requires good governance and these countries often fall short, partly because the rule of law requires clear and enforceable rights which are not very clear in most African States statutory regulations, e.g. on land tenure, access and use rights as well as forest and tree tenure and use rights.<sup>332</sup> Despite the existence of the EU FLEGT Scheme, the role of law and rule of law in forestry in international, regional and national forest regulation are not clear at the moment. Thus illegal logging and associated trade continue to undermine the rule of law.

### *3. Knowledge, capacity and resources*

Avenues for strengthening institutions with knowledge, capacity and resources for FLEGT include The EU FLEGT Facility, the FLEGT Library (EU FLEGT Publications) and the EU FAO FLEGT Programme. While the EU FLEGT Action Plan was approved and launched in 2003, the EU FLEGT Facility was established in 2007 and housed within the European Forest Institute.<sup>333</sup> The purpose of the Facility is to serve as an institution that supports the EU, EU Member States and Partner Countries in implementing the EU FLEGT Action Plan. The Facility has multiple functions that include: facilitating and promoting exchange of information, building capacity and spearheading regional collaboration on FLEGT, disseminating information about the EU FLEGT Action Plan and FLEGT VPAs to interested countries, supporting discussions, interchange and dialogues in interested countries that seek to promote the adoption of FLEGT VPAs, providing technical support to partner countries (timber producing countries) on complexities of VPAs, advising and guiding the formulation and development of legality assurance systems, and supporting partner countries through capacity building to enable them to cope with the requirements set out in FLEGT VPAs.<sup>334</sup> The EU FLEGT publications provide a platform for education and public awareness. In addition, the FLEGT Library provides a repository of all FLEGT documents including the EU FLEGT Action Plan, the EU FLEGT Paper Series, and hierarchy of EU FLEGT Regulations. The EU FAO Programme's publications further stores documents, articles, brochures, and other relevant FLEGT material that gives a sound orientation to new entrants and interested parties.<sup>335</sup> Article 13 of the EUTR specifically makes provisions for technical assistance, guidance

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<sup>332</sup> For clarity on the requirements of the rule of law with regard to the regulation of SFM see: Maguire (above n22, 272)

<sup>333</sup> For more information see: EFI (2013). The goal. EU FLEGT Facility. European Forest Institute, Joensuu, Finland, pp. 1-78. [online] URL: [http://www.euflegt.efi.int/portal/home/vpas/the\\_goal/](http://www.euflegt.efi.int/portal/home/vpas/the_goal/) (Accessed 7 December 2014)

<sup>334</sup> EFI (above n333, 1-78)

<sup>335</sup> EU FAO (above 315)

and exchange of information.<sup>336</sup> Commentary: Informed decision-making on forest issues requires comprehensive, consistent and cross-sectoral knowledge, adequate capacity and sufficient resources. Regardless of efforts by the EU FLEGT Scheme, there are knowledge gaps, and lack of capacities (i.e. human, physical and financial) for programme implementation.<sup>337</sup>

#### **4.2.3 Interim conclusion**

The EU FLEGT Scheme has emerged as a landmark legal regime in the forestry sector which sets FLEGT and GFG as preconditions for effective SFM. The uniqueness of the EU FLEGT Scheme is reflected in its rare combination of trade agreements and a series of interrelated regulations to curb illegal logging. Furthermore, the EU FLEGT Scheme directly influences national-level policy and legislative reforms and triggers good forest governance. The VPAs have excelled in promoting multi-stakeholder participation in policy and legislative reforms in timber producing countries. The principles and elements of VPAs are a firm foundation for GFG and support SFM. However, there are credibility gaps in the various VPAs. In addition, human, physical and financial capacities for FLEGT need reinforcement. The next chapter gives detailed conclusions and recommendations of the evaluation of the EU FLEGT Scheme.

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<sup>336</sup> EU FAO (above 315)

<sup>337</sup> Husgafvel. (above n41)

## 5.0 Conclusion

### 5.1 Conclusions and Recommendations

GFG and SFM are essential for promoting the social, economic and environmental benefits associated with Africa's forests. One of the most important emerging forest regimes that seek to promote GFG and support SFM is the EU FLEGT Scheme. This dissertation has sought to construct a theoretical framework from relevant SFM and GFG discourse to evaluate the EU FLEGT Scheme. Several key issues emerge from this evaluation and these are discussed in the next section.

The three broad cross-cutting themes

*Clear, coherent and consistent law and policy*

The EU FLEGT Action Plan sets out a range of measures aimed at curbing illegal logging and trade in timber and timber products. The measures are categorized into 7 interrelated themes. Subsequently, there is a hierarchy of regulations to support the implementation of the Action Plan. In the midst of these regulations there is an instrument which seeks to reconcile all forest-related national laws so as to forge synergy and mainstream issues of illegal logging across various sectors. The sequence of the regulations and their purpose is logical and befitting of an equitable legal regime dealing with such a complex issue as illegal logging. Reference is often made to the EU, Member States, and Partner Countries, and the linkage between these partners is clearly articulated. VPAs are a mechanism through which EU influences the alignment of national-level policies and legislation to enable FLEGT, GFG and SFM. Some progress has been noted regarding policy and legislative reforms through reviews and alignment of national policies and legislation in Partner Countries. Nonetheless, there is a lot of work to be done considering that most policies and legislation is fragmented and out-dated and Partner Countries are unable to effect some of the laws listed in VPAs.

In order to further improve policy and legislation alignment and consistency, the EU through its EU FLEGT Facility and the EU-FAOFLEGT programme should set up a focussed and fully-fledged programme. This programme can be initiated through a regional project on review, amendment and enactment of relevant forest-related policies and legislation in Partner Countries. The sole purpose of this project would be to harmonize all national forest-related laws for ease of implementation of the various components of the EU FLEGT Action Plan (basically the VPAs and the EUTR). This project would include stocktaking for a clear situation analysis, stakeholder consultations and synthesis on illegal logging. Ultimately, necessary amendments should be made to relevant laws, to

ensure policies and legislation regarding issues of illegal logging are aligned, harmonised and consistent. This programme would complement the VPAs.

#### *Coherence of legislation and rule of law (respect of rule of law)*

The EU FLEGT Scheme comprises a set of instruments that are in line with the principles of international law, and thus easily align with the rule of law. The role of law in SFM is also well captured in the VPAs and the EUTR. Furthermore, the EU FLEGT Scheme makes provisions aimed at addressing issues of land tenure, access and use rights, and forest and tree tenure and use rights. These issues are the centre of forest regulation and forest governance at national and regional level. Clear and enforceable rights are a precondition for the rule of law. The nature and dynamics of use and ownership rights in Partner States is fuzzy resulting in lack of coherence of legislation and rule of law.

In order to reform national legislation to the extent that it is in keeping with the requirements of rule of law the EU may need to make amendments to the EUTR. For example, the EUTR might include provisions for the inclusion of clear and enforceable use and owner rights by Partner Countries. The implementation of the EU FLEGT Action Plan, especially the VPAs and enforcement of its regulations particularly the EUTR need national-level statutory regulations to contain clear and enforceable rights. The EU may also adopt and modify the commitments on national policies and measures for SFM and GFG in paragraph 6 of the NLBI.

#### *Knowledge, capacity and resources*

The EU FLEGT Scheme has strength in knowledge management and information dissemination through various channels. The EU FLEGT Facility and the EU-FAO FLEGT programme and other associated networks play a major role in capacity building and training. Accordingly, the EU-FAO FLEGT programme is responsible for funding projects that implement the EU FLEGT Action Plan. In addition, the VPAs act as a mechanism for channelling resources to Partner Countries to strengthen various institutions in forest governance. Ultimately, this is a clear indication that the EU FLEGT Scheme prioritizes knowledge, capacity and resources which are perceived as critical and essential elements for enabling implementation of FLEGT.

The EU needs to reinforce and strengthen its current mechanisms. One option could be to adopt and modify the commitments regarding international cooperation and trade in forest products as

enshrined in section VI paragraph 7 of the NLBI. Through cooperation of States, knowledge can be shared widely and capacity can be greatly enhanced through collaboration. Consequently, high-level of political commitment could unlock financial resources to strengthen means of implementation for FLEGT, GFG and SFM.

The twelve specific substantive legal issues/themes

*Security and clarity on land tenure, access, ownership and use rights*

All the listed regional and international instruments surrounding GFG and SFM have not directly addressed the issues of land tenure, access, ownership and use rights over land and other resources. But the EU FLEGT VPAs has served as a useful tool for integrating land issues in FLEGT programmes in Partner Countries. Examples of success stories in several Partner Countries have been highlighted in this regard, however there are inconsistencies in VPA text of Partner Countries. Therefore, the EU should consider that in all Partner Countries VPAs include provisions for policy and legislative reforms to include very clear enforceable land tenure and use rights. This would enhance adherence to the requirements of rule of law in the forest sector.

*Stability of institutional structures*

The EU FLEGT Scheme supports institutional strengthening through empowerment of national governments and the private sector. The EU FLEGT Facility, the EU-FAO FLEGT programme and VPAs are supporting projects and programmes for initiating an enabling environment for institutional strengthening. The EU provides catalytic funding for training and capacity building and knowledge management and information exchange to enhance institutions in Partner Countries. This is due to the fact that without well established and capacitated institutions the implementation of the FLEGT Action Plan and in particular the VPAs would not be feasible. In view of the poor institutional frameworks and institutional arrangements in most Partner Countries, the EU should consider reinforcing current efforts in promoting institutional strengthening. Further, the EU should develop instruments to include mandatory characteristics of institutions for leading GFG and SFM programmes. This could improve delivery on GFG and SFM and positively influence FLEGT implementation.

*Clear environmental and forestry standards*

Environment and forestry standards include social safeguards. The EU FLEGT Scheme comprises key instruments that seek to improve standards for FLEGT, GFG and SFM. However, the Scheme

does not have substantive environmental and forestry standards. Partner Countries set the standards and these are not uniform and full of disparities across the States. Notably the EUTR does not recognize international voluntary mechanism despite the latter having strong environmental and forestry standards. Accordingly, the formulation and development and review of standards at FSC and PEFC involve extensive multi-stakeholder consultations. It is strongly recommended that the EUTR either recognizes the FSC and the PEFC certified timber (like the NLBI) or adopt and modify the principles and criteria from these private labels. The EU FLEGT Scheme must consider developing a clear mechanism for clear environmental and forestry principles, criteria, indicators and standards for SFM, GFG and FLEGT in the future.

#### *Effective and equitable approval processes*

In the African context, the preparation, negotiation, development and implementation phases of the VPAs takes a long time, and this is confirmed by the absence of FLEGT-licenced timber until now. The EU FLEGT Scheme has led to unprecedented extensive multi-stakeholder consultations and involvement in the VPAs process. Thus Government, civil society organizations, local communities and the private sector have converged to deliberate on pertinent issues on FLEGT, GFG and SFM. Furthermore, the processes involved in VPAs require approvals from national parliaments, which is another complexity. So there is no short cut. Most importantly, issues of corruption in the forestry sector and illegal logging are complex by nature hence this long and tenacious cycle. A new approach should be adopted to reduce the time lag from negotiation to implementation of VPAs. This could involve lobbying for political will and support from decision-makers. In the interim, while VPAs are being negotiated and implemented in part, alternative measures for curbing illegal logging, and advancing GFG and SFM should be adopted without interfering with due VPA processes such as DDS and others. The advantages of the approval processes (e.g. extensive participation that inspires equity and promotes efficacy, efficiency and effectiveness) outweigh its disadvantages (i.e. long time frames). Ultimately, in collaboration with Partner Countries the EU should revise the FLEGT Scheme and devise a mechanism to reduce the time frames on approval processes.

#### *Transparency, accountability, and public participation*

Contemporary forest governance centres on transparency, accountability and stakeholder involvement in policy and legislative processes. The EU FLEGT Scheme in its entirety, and particularly the VPAs, is founded on international law and principles of good governance. It

embraces and supports transparency, accountability and public participation as a mechanism to curb illegal logging and promote GFG and SFM. Thus VPAs form the central plank for GFG and support participatory forest management and enhance SFM. Furthermore, to complement its governance dimension, the EU can adopt and modify certain commitments in Section V paragraph of the NLBI which are aimed at stimulating GFG.

#### *Cooperation and coordination procedures*

Effective cooperation procedures between the Partner Countries, the EU and Member States through the JIC have yielded the desirable results for the EU FLEGT Scheme. Firstly, the EU FLEGT aims to develop multilateral cooperation to promote joint effort for curbing illegal logging. Secondly, these procedures are captured and clearly outlined in the roadmap for the implementation and monitoring of the VPAs. Existing cooperation instruments and cooperation programmes within EU Member States strengthen cooperation and coordination of FLEGT. Article 12 of the EUTR provides for cooperation. To further strengthen cooperation and coordination, the EU FLEGT Scheme can adopt and modify the commitments for regional and international cooperation contained in Section VI paragraph 7 of the NLBI.

#### *Monitoring and evaluation and reporting*

The various instruments contained in the EU FLEGT Scheme underscore the importance of monitoring, assessment and reporting on FLEGT. Council and Commission Regulations, VPAs, the EUR and the secondary pieces of legislation supporting its implementation all make provisions for monitoring. Monitoring can be further enhanced through training and capacity building of all actors in monitoring, evaluation and reporting. The EU should make provisions to ensure that results of monitoring and evaluation reports are utilized in subsequent implementation and re-designs of FLEGT, GFG and SFM processes and programmes.

#### *Effective compliance and enforcement*

The EU FLEGT Scheme through VPAs provides an opportunity for training and capacity building for various stakeholders and actors in forestry and FLEGT in Partner Countries. In addition, Article 12 and Article 13 of the EUTR make provisions for Cooperation and technical assistance, guidance and exchange of information. This is a firm indication of the willingness of the EU to upgrade timber producing countries to a level where they are able to comply with the EUTR. Through regional and international cooperation the EU is likely to raise the level of compliance and

enforcement in the forestry sector. This will serve as a good foundation for GFG and SFM in Africa. To improve compliance and enhance enforcement, the EU may adopt and re-contextualize the normative and instrumental theories of compliance in the African context. This could be infused in the principles of FLEGT partnership agreements and the key elements of VPAs.

#### *Financial incentives and economic instruments for sustainable use*

The new discourse of international forestry has recognized the significant role that local and national level forest governance play in global forestry. Most of the forest resources are harboured by poor local communities and indigenous peoples in third world countries. These communities are faced with a broad spectrum of socio-economic challenges. They have turned to forests and other natural resources at their disposal. Consequently, they sustain their livelihoods through indiscriminate deforestation and illegal logging. The EU FLEGT Scheme has introduced the VPAs that come with a wide range of benefits, but no clear financial incentives are provided for SFM per se. The EU might need to seriously consider a mechanism for cash vouchers or alternative economic incentives (such as food parcels) for local communities or households involved in SFM (i.e. within the VPA framework). Alternatively, the establishment of a forest stewardship fund under VPAs would encourage local communities to participate in SFM. Otherwise local communities will struggle for survival and engage in illegal logging as a coping mechanisms leading to a dismal failure of the current EU FLEGT model.

#### *Equitable sharing of forest benefits amongst stakeholders*

The EU FLEGT Scheme has undoubtedly improved governance in the forestry sector in Partner Countries. The level of transparency, accountability and stakeholder participation in the forestry sector creates an impression that access, use and benefit sharing has been improved. The visibility of local communities and civil society organizations and the positive response from government and the private sector is a good sign. To further improve equitable benefit sharing the EU should develop and implement a specific tool or mechanism for access, use and benefit sharing in the forestry sector, and dovetail under the VPAs. And consequently infuse it in all natural resources laws of relevance. The Nagoya Protocol on Access and Benefit Sharing of the UNCBD could shed some light.



### *Equitable conflict resolution procedures*

The EU has established the JIC for guiding and supervising the VPAs from the preparation, negotiation, development through the implementation phases. This should be the most ideal platform to deal with all conflicts arising from the VPAs and associated FLEGT licencing schemes. Examples of conflicts may vary from land tenure, access, ownership to use rights. The EU should encourage Partner Countries to establish national-level Conflict Resolution Committees to complement the JIC.

### *Mixture of regulatory approaches (direct regulation and voluntary mechanisms)*

The EU FLEGT Scheme is an exceptional model for combining direct regulation with legally-binding voluntary trade agreements. Notably the VPAs are enabled by EU Regulations for FLEGT Licences. This renders it a genuine theory of change in the FLEGT arena. This is seen by the value of VPAs in the implementation of the various components of EU FLEGT Action Plan. The direct impact of VPAs is manifested in observed policy and legislative reforms. Accordingly, meaningful dialogue on FLEGT, GFG and SFM has been initiated between government, civil society, local communities and the private sector. The VPAs have been used as a tool to address the underlying causes of illegal logging and the rampant corruption.

The EU needs to lobby for more political support and international collaboration and genuine commitment from Partner Countries on FLEGT as a way of strengthening the VPAs and EUTR model. Generally, the EU FLEGT Scheme appears to be the most comprehensive and most effective legal regime in the new forestry discourse. The innovation to influence local and national level governance and SFM is a step in the right direction towards effective local solutions for curbing illegal logging. This has a huge potential for the efficient implementation of FLEGT, GFG and SFM programmes. The EU FLEGT Scheme can be re-contextualized and be replicated to other parts of the world.

Finally, reduction in imports of illegal timber to the EU markets does not necessarily mean reduction in illegal logging in Africa per se. There is statistical proof that timber producing countries tend to supply increase their timber supply to domestic markets and other regional and international markets that have less stringent policy and legislative measures. Therefore, the EU may need to initiate negotiations and start collaborating with other international timber markets,

such as Australia, USA, China and Japan. This would enable these countries to collectively deal with illegal logging and make a positive impact at a global scale.

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